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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 712

DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY, a Minnesota corporation,
Petitioner-Appellant,

vs.

MICHIGAN CORPORATION AND SECURITIES COMMISSION and
MICHIGAN CORPORATION TAX APPEAL BOARD,
Defendants-Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

A. CITATIONS TO OPINIONS BELOW

(1) The opinion of the Supreme Court of the State of Michigan, review of which is sought, is printed in pages 42a to 78a of the Appendix, *infra*. (See Note 1 below.)

Note (1). As used herein, the word "Appendix" refers to addenda printed with this statement. The word "Joint Appendix" refers to the Joint Appendix or record certified by the Supreme Court of Michigan.

This opinion is officially reported in 353 Mich. 636 and unofficially in 92 N. W. 2d 22.

(2) The opinion and order of the Michigan Corporation Tax Appeal Board affirmed by the Michigan Supreme Court in the above opinion is printed at pages 155a to 197a of the Joint Appendix and on pages 1a to 41a of the Appendix *infra*.

B. STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

(i) This proceeding is an appeal to the Supreme Court of the State of Michigan from a decision of the Michigan Corporation Tax Appeal Board. In this decision the Board had affirmed a "determination" by the Michigan Corporation and Securities Commission fixing the annual franchise tax for the year 1952 of the petitioner-appellant, Duluth, South Shore & Atlantic Railroad Company, a Minnesota Corporation. The Commission had determined that tax pursuant to Section 5b of Act 85 of the Public Acts of Michigan for 1921 which is the general statute relating to the fees of corporations. This Section 5b had been added to the Act of 1921 by Act 183 of the Public Acts of Michigan of 1952 and is set forth verbatim in Section B (v) below. It is the contention of this appellant that this section 5b is unconstitutional under the Commerce Clause of the Federal Constitution, Article I, Section 8, Clause 3, and that such section was, in the case of this appellant, applied in a manner repugnant to that clause of the Constitution. The Michigan statute regulating this appeal to the Supreme Court of Michigan is Section 10, of Act 85 of the Public Acts of Michigan of 1921, as amended by Act 153, of the Public Acts of Michigan of 1954. See Compiled Laws of Michigan of 1948, 1954 Supplement Sec.

450.309; Michigan Statutes Annotated Cumulative Supplement Sec. 21.210. This statute is printed at pages 89a to 90a of the Appendix.

(ii) The judgment sought to be reviewed is dated the 11th day of September 1958 and was entered on the 11th day of September 1958. Petitioner-appellant filed a motion for rehearing with the Supreme Court of Michigan on September 26, 1958. This motion was denied by the Court by an order dated and entered on the 13th day of October 1958. Notice of Appeal was filed in the Supreme Court of the State of Michigan on December 30, 1958. Duplicate notices were also filed on the same day with the Michigan Corporation Tax Appeal Board and the Michigan Corporation & Securities Commission.

(iii) The statutory provisions believed to confer jurisdiction on the Supreme Court of the United States are 28 U. S. C. A. Sec. 1257 (2) and 28 U. S. C. A. Sec. 2103.

(iv) Cases believed to sustain the jurisdiction of this Court:

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282;

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157;

Railway Express Agency v. Virginia, 347 U. S. 359.

(v) The validity under the Commerce Clause of the Federal Constitution of Section 5(b) as added to Act 85, of the Public Acts of Michigan of 1921 by Act 183, of the Public Acts of Michigan of 1952, and the validity under the Constitution of the manner in which it has been applied to petitioner-appellant is questioned. This Section 5(b) may be found on pages 243 and 244 of the Public and

Local Acts of Michigan of 1952. It was amended in 1954 and is not printed in any compilation of Michigan Statutes. Its verbatim text is as follows:

> "Sec. 5b. For the purpose of determining the annual franchise fee the tax payable by a railroad company shall be measured by that portion of its paid up capital and surplus determined by the average of the following two percentage ratios: the net ton miles of freight handled in this state to the total net ton miles of freight handled within and without the state; the number of miles of all track over which it operates within this state to the total number of miles of all track over which it operates within and without the state: Provided, That in computing the tax of a non operating railroad, there shall be excluded that portion of its paid up capital and surplus as the ratio of the value of its property leased to an operating railroad bears to the total value of its assets."

Other relevant portions of Act 85 of the Public Acts of Michigan of 1921 are included in the Appendix at pages 85a to 89a.

C. QUESTIONS PRESENTED BY THE APPEAL

1. Did the Supreme Court of Michigan err in holding that Section 5b, Act 85, of the Public Acts of Michigan of 1921, as added to said Act 85 by Act 183, of the Public Acts of Michigan for 1952, was not repugnant to the Article I, Section 8, Clause 3, of the Constitution of the United States since it imposed a burden and restraint on interstate commerce conducted by petitioner-appellant, Duluth, South Shore & Atlantic Railroad Company, in Michigan and other states?

2. Did the Supreme Court of Michigan err in holding that Section 5b, of Act 85, of the Public Acts of Michigan

of 1921, as added to said Act 85 by Act 183, of the Public Acts of Michigan for 1952, had not been applied by the defendants to petitioner-appellant in a manner repugnant to Article I, Section 8, Clause 3, of the Constitution of the United States since the manner of its application imposed a burden and restraint on interstate commerce conducted by petitioner-appellant in Michigan and other states?

D. CONCISE STATEMENT OF THE CASE

This proceeding is an appeal by petitioner-appellant, Duluth, South Shore & Atlantic Railroad Company (which is a Minnesota corporation authorized to do business in the State of Michigan) from an order of the Michigan Corporation Tax Appeal Board entered on January 25, 1957, approving the method used by the Michigan Corporation and Securities Commission in determining the annual franchise tax of petitioner for the year 1952. The Corporation Tax Appeal Board is constituted and the manner of appealing to it is regulated by Section 450.309 (1954 Supplement) Michigan Compiled Laws of 1948 as amended, which is Section 21.216 (Cumulative Supplement) Michigan Statutes Annotated as amended. See pages 89a to 90a of the Appendix.

In 1952, the annual franchise tax of a corporation doing business in Michigan was 4 mills upon each dollar of its paid up capital and surplus. In the case of corporations engaged in interstate commerce, provision was made that the whole of their paid up capital and surplus should not be subject to the franchise tax, but instead a portion thereof should be allocated to Michigan by various formulae. The formula for railroads has been given at B (v) above. The statutes involved are Michigan Compiled Laws of 1948 (1954 Supplement), Secs. 450.304, and 450.305 (in

part) and Michigan Statutes Annotated Cumulative Supplement Secs. 21.205, and 21.208 (in part) and also Act 183, Public Acts of Michigan of 1952 Sec. 5(b). This last section is not included in any compilation having been repealed in 1954. The relevant portions of these statutes are printed in the Appendix at pages 85a to 89a.

For purposes of this appeal, the following statistics relating to appellant are applicable:

Paid up capital of appellant (Joint Appendix pp. 19a, 156a and 187a).....	$10,500,000.00
Surplus of appellant (Joint Appendix pp. 19a, 156a and 187a).....	1,693,500.00
Net ton miles of freight handled in Michigan, including interstate freight (Joint Appendix p. 15a).....	532,709,000
Net ton miles of freight handled in Michigan, *excluding* interstate freight (Joint Appendix pp. 75a, 76a and 122a)	61,031,000
Net ton miles of freight handled everywhere (Joint Appendix 15a).....	677,639,000
Track miles in Michigan (Joint Appendix p. 15a).....	558.37
Total track miles (Joint Appendix p. 15a)	687.85

As has been stated, the allocation formula in Section 5(b) of the Act imposing the annual franchise tax provides for the allocation to Michigan for tax purposes of that portion of its capital and surplus determined by the average of the ton mile and the track mile ratios. In calculating the applicable allocation ratio, the Michigan Corporation Tax Appeal Board and Michigan Corporation and Securi-

ties Commission included and took account of the ton miles of freight transported by appellant in interstate commerce. Thus:

$$\frac{\text{Net ton miles of freight (interstate and intra state) in Michigan } 532{,}709{,}000}{\text{Net ton miles of freight total } 677{,}639{,}000} = 78.61\%$$

$$\frac{\text{Miles of track in Michigan } 558.37}{\text{Miles of track total } 687.85} = 81.18\%$$

$$\frac{81.18\%}{2/199.97\%}$$

$$79.89\%$$

So 79.89% of the capital and surplus of appellant was allocated to Michigan for purposes of the annual franchise tax.

If, as appellant contends should have been done, the net ton miles of freight transported by appellant in Michigan in interstate commerce had been omitted, only 45.09% of appellant's paid up capital and surplus would have been allocated to Michigan for purposes of the annual franchise tax. Thus:

$$\frac{\text{Net ton miles of freight (intra state) in Michigan } 61{,}031{,}000}{\text{Net ton miles of freight total } 677{,}639{,}000} = 9.00\%$$

$$\frac{\text{Miles of track in Michigan } 558.37}{\text{Miles of track total } 687.85} = 81.18\%$$

$$\frac{81.18\%}{2/90.18\%}$$

$$45.09\%$$

The annual franchise tax of appellant calculated while including ton miles of freight transported in interstate commerce in Michigan would be $38,967.64. The same tax without including ton miles of freight transported in interstate commerce in Michigan would be only $21,994.20.

The question of unconstitutionality involved in this appeal was first raised by this appellant before the Michigan Corporation Tax Appeal Board and was decided by that Board adversely to this appellant. This appears from the opinion of that Board (See pages 192a-197a of the Joint Appendix which are also printed at pages 36a to 41a of the Appendix to this Jurisdictional Statement.)

The question of unconstitutionality was first raised before the Michigan Supreme Court in the application for leave to appeal to that court, where the following language was used (pp. 5 to 6 of Application for leave to appeal to Supreme Court of Michigan.)

> "This action by the Corporation and Securities Commission and by the Corporation Tax Appeal Board is in violation of the rights of Petitioner under and by virtue of paragraph 3, of Section 8, of Article I, of the Constitution of the United States for the following reasons, among others, to-wit:
>
> (a) It constitutes a direct burden upon interstate and foreign commerce;
>
> (b) It constitutes an unreasonable burden on, and is imposed directly upon interstate and foreign commerce;
>
> (c) It is a direct tax imposed on the privilege of carrying on interstate and foreign commerce;
>
> (d) It fails to make, insofar as the net ton miles of freight handled factor under said Section 5(b) is concerned, any constitutional apportionment or allocation between freight transported by

petitioner interstate in the State of Michigan (that is, of freight transported from points without the State of Michigan to points within this state and of freight transported from points within the State of Michigan to points outside of this state and from points outside the State of Michigan across the State of Michigan to other points outside the State of Michigan) and freight transported by petitioner intrastate in the State of Michigan (that is, from points within this state to points also within this state)."

E. A SUBSTANTIAL FEDERAL QUESTION IS INVOLVED

1. How Supreme Court of Michigan construes statute involved.

In this case the Appellant has drawn in question the validity of section 5(b) of Act 85, of the Public Acts of Michigan for 1921, as added to that Act by Act 183, of the Public Acts of Michigan for 1952, on the ground that it is repugnant to the Constitution of the United States, and that the decision of the Supreme Court of Michigan from which this appeal is taken, is in favor of its validity. An appeal then is clearly warranted by 28 U. S. C. A. Sec. 1257(2). It is submitted for the reasons about to be stated that the question presented is substantial enough to warrant plenary consideration by this court.

The Supreme Court of Michigan explains the basis of its judgment in this case as follows:

> "We construe the formula in Section 5b as having as its purpose the ascertaining of a fair proportion of appellant's paid up capital and surplus allocable to Michigan for purpose of taxing appellant's right to carry on its intra state business." (353 Mich. at page 63). (Appendix p. 67a.)

2. Allocation formula approved by Michigan Supreme Court.

As has been stated, this formula is the average of the two following "percentage ratios", i.e., fractions, viz:

$$\frac{\text{Net ton miles of freight in Michigan, both interstate and intra state } 532{,}709{,}000}{\text{Total net ton miles of freight } 677{,}639{,}000} = 78.61\%$$

$$\frac{\text{Miles of track in Michigan } 558.37}{\text{Total miles of track } 687.85} = 81.18\%$$

$$2\ 159.97$$

$$79.89\%$$

The Supreme Court of Michigan expressly supports this tax as a tax on the privilege to conduct an intra state business in Michigan which the State of Michigan has accorded to the appellant. But in calculating this privilege fee the formula relies almost wholly on the interstate business done by appellant: 88.5% of the net ton miles of freight transported by it in Michigan were transported in interstate commerce, only 11.5% of such freight was transported in intra state commerce. If interstate ton miles had been omitted from the formula the tax of appellant would have been only $21,994.20; the inclusion of the formula of these interstate ton miles increased the tax to $38,967.64.

3. Actually it imposes a tax on the privilege of engaging in Interstate Commerce.

The intra state commerce carried on by appellant in Michigan is trifling: to say that the privilege fee here involved is a tax on the right to carry intra state commerce is, we submit, flatly contrary to the fact. The tax is, and actually is intended to be, a tax on the privilege of carrying on interstate commerce and for that reason is clearly forbidden by the commerce clause of the Federal Constitution (Article I, Sec. 8, Clause 3). It is obvious that the Supreme Court of Michigan holds that a tax, which is actually on the privilege of conducting interstate commerce, will be unobjectionable if only it can be found that the taxpayer involved engages in some intra state commerce no matter how trifling the amount.

We believe that the holdings of this Court, the Supreme Court of the United States, do not support this contention. This is not a property tax but is strictly and confessedly a tax on the privilege of doing business, in Michigan, and is actually, though not confessedly, a tax on the privilege of doing interstate business in Michigan.

Moreover, the tax is measured in part by the miles in Michigan over which goods are transported by appellant in interstate commerce in Michigan, that is, it is measured by the most essential and integral element of interstate commerce itself.

4. Decisions of this Court invoked by appellant.

The general principle here applicable was stated in a comparatively early case, *Adams Express Co. v. Ohio Auditor General,* 166 U. S. 185, at page 218:

> "Again and again has this court affirmed the proposition that no state can interfere with interstate

> commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce."

It was stated again in *East Ohio Gas Company v. Tax Commission of Ohio*, 283 U. S. 465, at page 470:

> "It is elementary that a state can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom * * *. And, while a state may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction, in order to be valid, must be imposed solely on account of the intrastate business without enhancement because of the interstate business done, and it must appear that one engaged exclusively in interstate business would not be subject to the imposition, and that the taxpayer could discontinue the intrastate business without withdrawing also from interstate business."

In *Cooney v. Mountain States Tel. & Tel. Co.*, 294 U. S. 384, the State of Montana had imposed an annual license tax on the Telephone Company which was based on the number of telephones used in the conduct of taxpayer's business. These telephones could be used for interstate and foreign calls as well as for intra state calls. The tax was held unconstitutional as an interference with interstate commerce and the court said at pages 392-393:

> "There is no question that the state may require payment of an occupation tax from one engaged in both intrastate and interstate commerce. But a state cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. * * * Where the tax is

> exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business."

This court also pointed out (p. 390) that the terms of the statute were general and that the license fee was charged against the business of the telephone company as such, without discrimination between local and interstate business. That is exactly what the Michigan statute here involved does, it levies a license tax on the privilege of doing business in Michigan, just as the Montana law imposed a license tax on the Montana business of the telephone company, without discrimination between local and interstate business.

In *Spector Motor Service v. O'Connor*, 340 U. S. 602, the State of Connecticut sought to tax the Spector Company for the privilege of engaging in business in Connecticut. The sole business of the company was interstate trucking. The tax was based on a portion of the net income of the company allocated to Connecticut pursuant to a formula. The tax was held unconstitutional as an imposition on interstate commerce. Admittedly, the taxpayer did no intra state business in Connecticut, but it is submitted that this is not enough to distinguish that case from the case at bar: the small amount of business done by this taxpayer in Michigan does not warrant the taxing of its interstate business in Michigan which is just what the allocation formula here involved does.

In *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157, the State of Texas imposed a tax on the "gathering" of gas in Texas preliminary to its transportation out

of Texas in interstate commerce. In holding the tax unconstitutional, this court said:

> "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it" (p. 166).

A similar case brought by Panhandle Eastern Pipe Line Company was heard at the same time and decided in the same way. In that case it appeared (see p. 162) that the Panhandle Company sold in Texas in intra state commerce a small amount of the gas gathered by it in Texas; but it was held that this was immaterial and that the tax constituted an unconstitutional interference with interstate commerce. In the same way the small amount of intra state business done by this appellant in Michigan is immaterial.

In *Railway Express Agency v. Virginia*, 347 U. S. 359, the State of Virginia had levied an annual tax based on the gross receipts from the taxpayer's business in that state. This business was entirely interstate, it did no intra state business whatsoever. The state labeled its tax as a property tax, but this court held that it was actually a license tax and unconstitutional as a burden on interstate commerce. In the case at bar, the Supreme Court of Michigan has "construed" the tax as a tax on intra state commerce. Actually, it is nothing of the sort, instead it is a tax on interstate commerce. In the Railway Express case, this court said:

> "It is enough to say that we recently have ruled that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax" (p. 368).

5. Where a corporation is engaged in both interstate commerce and intra state commerce certain elements of the interstate process cannot be considered at all in fixing the privilege fee exacted from that corporation for the privilege of engaging in intra state commerce. The transportation of materials in interstate commerce is one of them.

The point this appellant is attempting to raise is as follows: Where a corporation is engaged in both interstate and intra state commerce there are certain elements of the interstate process that are such essential and integral parts thereof that they cannot be considered at all in fixing the privilege fee which such a corporation must pay for the privilege of engaging in intra state business in the state. This court has held that the gathering up and the putting down of the interstate commodities as an integral part of their interstate movement are not adequate grounds for imposing a state privilege fee. *A fortiori* the interstate movement itself of the commodities is not ground for the imposition of a privilege fee.

Other matters which are connected with the interstate process may be considered in the calculation of a corporate privilege, for example, tangible property and wages paid. These things are merely connected with interstate commerce, but the transportation of commodities is interstate commerce itself.

It is submitted that this transportation cannot be considered at all for the purpose of measuring a privilege fee, and that this is true regardless of the effect which considering it may have upon the amount of the privilege fee involved; whether it increases or decreases the tax exacted is immaterial.

6. The Supreme Court of Michigan denies this and a plenary hearing is warranted in this case.

As appears in the dissenting opinion of Justice Kelly in this case (Appendix pp. 73a to 79a), the Supreme Court of Michigan has hitherto felt itself to be bound by the authorities cited above. In the case of *Gartland Steamship Co. v. Commission,* 339 Mich. 661, it ordered the Michigan Corporation & Securities Commission to recompute the annual franchise tax of the Steamship Company "excluding any and all cargoes transported in interstate and foreign commerce." In *Panhandle Eastern Pipe Line Co. v. Commission,* 346 Mich. 50, it ordered the Commission to recompute the franchise tax of the Company without reference to sales in Michigan of gas transported into Michigan in interstate commerce and sold immediately to customers. These two authorities are in effect overruled by the opinion in the case which is the subject of this appeal.

If we are wrong and this court now will hold that it is proper for the states to measure corporate privilege fees by the amount of pure interstate commerce done by the taxpayer, should this not be stated after a full hearing of this appeal on the merits? We submit that for this reason this appeal should be heard.

H. A copy of the opinion of the Supreme Court of Michigan delivered upon rendering the judgment sought to be reviewed appears at pages 42a to 78a of the Appendix. A copy of the opinion of the Michigan Corporation Tax Appeal Board relating to the subject matter of this appeal appears at pages 1a to 41a of the Appendix.

I. A copy of the judgment appealed from appears at page 79a of the Appendix.

CONCLUSION

Appellant respectfully asks that plenary consideration with briefs on the merits and oral argument be granted in this case.

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APPENDIX

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF CORPORATION TAX APPEAL BOARD

This proceeding is an appeal by Duluth, South Shore and Atlantic Railroad Company from the determination by the Michigan Corporation and Securities Commission of the amount of the privilege fee owing for the taxable period commencing September 1, 1952. The appeal is authorized by Section 9 of Act 85 P. A. 1921.[1]

This matter having been submitted, the Corporation Tax Appeal Board makes the following

Duluth, South Shore and Atlantic Railroad Company (appellant) was organized as a Minnesota corporation on October 19, 1949 and admitted to Michigan on December 12, 1949. On September 2, 1952 it filed with the Michigan Corporation and Securities Commission its annual report for the period commencing September 1, 1952. The annual report so filed contained copy of the balance sheet statement as of December 31, 1951 which showed the following pertinent entries:

---

[1] Sec. 9 of the 1921 act authorizes an appeal from the decision of the Secretary of State. The powers and duties of the Secretary of State relating to the determination of privilege fees owing by corporations were transferred to the Corporation and Securities Commission by Act 13 P. A. 1935 as amended by Act 228 P. A. 1939. Subsequent to the filing of the appeal here involved Sec. 9 was amended by Act 153 P. A. 1954 but such amendment did not change the membership of the Corporation Tax Appeal Board. As amended Sec. 9 now appears as Sec. 450.309 C. L. '48 Mason's 1954 Supp.; Section 21.210 Michigan Statutes Annotated 1955 Cumulative Supplement.

LIABILITIES	Per Books 12-31-51	Adjustments	Adjusted Balance Sheet 12-31-51
Stock:			
751 Capital Stock....	$10,500,000.00	Dr. 8,866,200.00	$1,633,800.00
* * * * *			
Surplus:			
785 Earned Surplus —Appropriated	$ 125,000.00		$ 125,000.00
786 Earned Surplus —Unappropriated	1,568,500.82	Dr. 1,479,110.00	89,390.82
Total	$ 1,693,500.82		$ 214,390.82

Appellant supplemented its balance sheet statement with notes as of December 31, 1951 which may be summarized:

That appellant was organized for the purpose of operating the properties of two predecessor companies (the Duluth, South Shore & Atlantic Railway Company and the Mineral Range Railroad Company) which it had acquired, as will hereafter be described in more detail, pursuant to the reorganization plan of the predecessor companies under Section 77 of the Bankruptcy Act as amended.

Total capitalization of appellant upon consummation of the plan amounted to $15,500,000 (exclusive of equipment obligations) consisting of $5,000,000 First Mortgage Income Bonds and 210,000 shares of no par common stock with a stated value of $50 per share aggregating a total stated value of $10,500,000.

Appellant says the stated value of $10,500,000 recorded per books for its capital stock has no significant relationship to paid-in capital nor to the market value of property received in exchange for such shares. Instead it says that a market value should be assigned

to the shares determined by application of an earnings ratio.

Appellant says that based upon Moody's Investment Service for the year 1949 the average market price of 25 railroad stocks was 7.78 times earnings. Appellant applies this earnings ratio to the earnings of its own company in the following manner:

Average net railway operating income, 5-year period ended December 31, 1951..	$ 458,424
Less: Annual interest charges of the reorganized company	247,818
Average earnings on shares of common stock assuming the present capital structure had been in effect during the 5-year period	$ 210,606
Moody's 1949 price-earning ratio of 25 railroad stocks	7.78*
Total market value of South Shore stock (average earnings times Moody's price-earnings ratio)	$1,633,800

*This ratio is substantially the same as the 8 times gross rentals ratio for determining property values mentioned in Sec. 490.305(1).

[It is appropriate to comment at this point that the 5-year average earnings of $210,606 used by appellant when multiplied by the earnings ratio of 7.78 equals $1,638,514.68 and not the amount of $1,633,800 as stated by appellant. The sum of $1,633,800 appears to be obtained by multiplying 210,000 (number of authorized shares) by 7.78 which equals $1,633,800.]

Accordingly appellant shows on its balance sheet statement the market value of its capital stock at $1,633,800 which results in a balance sheet adjustment of $8,866,200 being the difference between the stated value of the capital stock and the market value assigned to the shares by appellant.

Appellant's balance sheet statement shows a total of earned surplus per books at December 31, 1952, of $1,693,500.82, but as adjusted at that date appellant states the total of earned surplus to be $214,390.82. The difference between these sums of $1,479,110 is recorded on the balance sheet as an adjustment and is explained by the appellant as consisting of "Surplus paid-in in the reorganization exchange—$629,110" and "Tax exempt U. S. Govt. securities—$850,000." After making this adjustment appellant labels the resultant amount of $214,391 (rounded) as "the taxable surplus."

In the 1952 annual report appellant computes the amount of the privilege fee which it paid under protest in the following manner:

Paid-in capital (adjusted)	$1,633,800
Taxable surplus	214,391
Aggregate paid-in capital and taxable surplus	$1,848,191

Determination of Apportionment Formula

Freight Service			
Net ton miles of revenue freight	532,709,000 (in Mich.) / 677,639,000 (Total)	=	Ratio in Michigan 78.61%
Trackage			
Number of miles of all tracks operated	558.37 (In Mich.) / 637.85 (Total)	=	87.18%
			2/159.79%
	Average ratio in Michigan		79.895%

Application of Apportionment Formula and Computation of Amount of Privilege Fee

$1,653,800 (System paid-in capital) × 79.895% (average ratio) = $1,305,324.51 (Mich. portion) × 4 mills.....	$5,221.30
$214,391 (taxable portion of system surplus) × 79.895% (average ratio) = $171,287.69 (Mich. portion) × 4 mills	$ 685.15
Total privilege fee as computed by railroad company....	$5,906.45
Filing fee	$ 2.00
Amount paid under protest.....	$5,908.45

* * * * * *

The Corporation and Securities Commission (appellee) computed the amount of the privilege fee as follows:

> It carried out the freight service ratio in Michigan to 78.6125% and the trackage ratio to 81.1761% which gave an average ratio in Michigan of 79.8943%.

The Commission determined the amount of the privilege fee by application of the following formulas:

$10,500,000 (Capital stock at stated value) × 79.8943% (average ratio) = $8,388,901.50 (Michigan portion) × 4 mills.....	$33,555.60
$1,693,500.82 (Total surplus) × 79.8943% (average ratio) = $1,353,010.63 (Michigan portion) × 4 mills	$ 5,412.04
Total privilege fee as computed by Commission.....	$38,967.64
Filing fee	2.00
Total as computed by Commission.....	$38,969.64

* * * * * *

The difference in the amount of the privilege fee as computed by the railroad and by the Corporation and Securities Commission is .....$33,061.19.

Appellant transmitted its 1952 annual report to the Commission with a covering letter in which it assigned the reasons for its protest of the payment of the privilege fee. The grounds of appellant's protest may be summarized:

1. The fee was not due in 1952 because Act 210 P. A. 1952 which amended Sec. 82 of Act 327 P. A. 1931 by subjecting railroad companies to the requirement of filing an annual report was not given immediate effect and therefore became effective on September 18, 1952 after the last day for filing the 1952 annual report. The subsequent re-enactment of the provisions of Act 210 by Act 270 P. A. 1952, which was given immediate effect and was approved June 12, 1952, is claimed to be invalid and ineffectual for its intended purpose.

2. That the privilege fee imposed by Act 183 P. A. 1952 constitutes double taxation and is the taking of property without due process of law and a denial to the appellant of the equal protection of the laws.

3. That the tax imposed by Act 183 is an ad valorem property tax and not an excise tax or specific tax and constitutes double taxation.

4. Act 183 is void because it contravenes the provisions of Sec. 1 of Article 10 Michigan Constitution in that at the time the constitution became effective on January 1, 1909 the franchise of appellant to carry on its business was a subject of taxation contributing to the primary school interest fund under laws then in effect and that to now tax the same property by a privilege fee payable into the general fund of the state violates the provisions of Sec. 1 of Article 10 aforesaid.

5. That Act 183 is void because it contravenes Sec. 6 of Article 10 Michigan Constitution which requires every law which imposes a tax to distinctly state the tax.

The Commission notified appellant by letter dated April 13, 1953 of its determination of the amount of the privilege fee and demanded payment of an additional sum of $33,061.19. Appellant responded by filing with the Commission its Appeal from Determination, dated April 17, 1953, and by paying an appeal fee of $10.00.

On April 27, 1953 by letter to the Commission appellant amended and supplemented its 1952 annual report by supplying additional information regarding the reorganization plan in the bankruptcy proceedings and explaining the method by which it arrived at its valuation of the common stock.

On August 11, 1953 the Commission issued its ruling in the form of a letter holding against the appellant on the grounds of its protest and method of computation of the privilege fee.

On August 21, 1953 appellant filed with the Commission its Supplemental Appeal from Ruling of Commissioner of Michigan Corporation and Securities Commission and paid an additional appeal fee of $10.00. This communication constituted an appeal by appellant from the determination made by the Commission to the Corporation Tax Appeal Board.

Subsequently appellant filed with the Appeal Board its Amendment of Appeal as Supplemented Setting Forth Petition for Redetermination of Assessment (undated) which merely supplemented the prayer for relief theretofore filed by appellant.

The matter of the appeal came on for hearing before the Corporation Tax Appeal Board in the Capitol Building at Lansing, Michigan on April 25, 1956. At that hearing appellant conceded that the inclusion by the Commission of U. S. Government Bonds in the amount of $850,000 in

earned surplus was proper and abandoned its claim that this item should be eliminated in the computation of the privilege fee (Tr. pp. 3 and 83). Appellant further stated that it had adjusted the ratio in accordance with the principles established in the Gartland Steamship Case (339 Mich. 661) and after making the adjustments to earned surplus and in the ratio, appellant contended the amount of its privilege fee for the year 1952 should be $4,866.46.

At the April 25th hearing appellant called as a witness Peter N. Todhunter. Mr. Todhunter identified a number of exhibits which were admitted in evidence, among them being Exhibit 2 which was identified as a printed booklet containing a number of documents prepared by and for the reorganization managers in the proceedings involving appellant for the purpose of being submitted to bondholders and other security holders, in connection with their voting on the plan of reorganization (Tr. p. 53). In more detail Exhibit 2 contains

(a) A plan of reorganization of The Duluth, South Shore and Atlantic Railway Company and Mineral Range Railroad Company submitted to the Interstate Commerce Commission for approval;

(b) The report of the Interstate Commerce Commission on the proposed plan of reorganization;

(c) The order of the District Court of the United States for the District of Minnesota, Fourth Division, Judge Nordbye presiding, approving the plan of reorganization with opinion, filed July 31, 1948. The opinion of Judge Nordbye is reported in 80 F. Supp. 639.

In order to afford a better understanding of the plan of reorganization, appellant's connection with those proceedings and the relationship of the witness Todhunter to the reorganization plan, a resumé of the pertinent information contained in Exhibit 2 is undertaken. The Duluth, South Shore & Atlantic Railway Company (Debtor) on January 2, 1937 filed a petition in the District Court of the United States for the District of Minnesota, Fourth Division, showing that it was unable to meet its debts as they matured and that it desired to effect a Plan of Reorganization pursuant to Section 77 of the Bankruptcy Act. At that time in addition to a large amount of unsecured debts, Debtor scheduled outstanding mortgages on its properties as being:

Bonds secured by mortgage on property formerly operated by the Marquette, Houghton & Ontonagon Railroad Company (known as MH&O Mortgage District) bearing 6% interest, identified as Sixes and assumed by Debtor	$ 1,400,000
Bonds secured by DSS&A 5% First Mortgage identified as Fives	$ 4,000,000
Bonds secured by DSS&A Consolidated Mortgage, identified as Fours	$15,107,000
Unpaid interest on Fours	$21,599,315
Total	$42,106,315

On July 1, 1937 Mineral Range Railroad Company (Subsidiary Debtor) filed its petition in the District Court of the United States for the District of Minnesota praying that it be allowed to effect a Plan of Reorganization in connection with the Plan to be effected for the Debtor. At that time the outstanding obligations of Mineral Range Railroad Company in addition to large amounts of unsecured debt and equipment trust obligations consisted of $1,598,675 principal amount and $231,912 of unpaid interest owing on bonds secured by mortgages on its properties.

Of the Debtor's Fives $3,199,000 were held by investors other than the Canadian Pacific Railway Company; one individual bondholder held $4,000 of Mineral Range bonds; and Canadian Pacific Railway owned directly or indirectly all of the other outstanding bonds of both the Debtor and the Subsidiary Debtor. Canadian Pacific conceded from the outset that the Fives were secured by a first lien on Debtor's properties in the DSS & A Mortgage District. It claimed however that the $1,400,000 of Sixes which it owned were secured by a first lien on the properties in the M. H. & O. Mortgage District because they were secured by a mortgage placed on those properties in 1885 by the then owner before the properties were transferred to the Debtor. Canadian Pacific further claimed that the mortgage securing the $15,107,000 of Fours owned by it constituted a second lien on those properties by the M. H. & O. Railroad Company contemporaneously with its conveyance of those properties to the Debtor in 1890, and also because it was executed as a purchase money mortgage by the Debtor.

On April 29, 1939 steps were undertaken for the formation of a bondholders' protective committee for the holders of Fives which subsequently became known as the Hattstaedt Committee. The Hattstaedt Committee objected to the claims of Canadian Pacific that the M. H. & O, Sixes and the DSSA & A Consolidated Fours held by Canadian Pacific were entitled to a first and second lien respectively on the properties in the M. H. & O. District and filed opposing claims. After protracted litigation the Hattstaedt Committee and Canadian Pacific undertook negotiations in an effort to agree on a Plan of Reorganization. This resulted in an agreement to support a Plan providing, in addition to cash distributions, for the replacement of the old securities by issues of new securities and the allotment to the holders of the Fives of a share of such new securi-

ties proportionate to the worth of the DSS & A District as compared with the M. H. & O. District plus an additional amount of new securities by way of compromising unlitigated lien and subordination claims. An outline of a plan of this character was submitted jointly by the Hattstaedt Committee and Canadian Pacific to counsel for the Debtor suggesting that a plan of such character be submitted to the Court and to the Interstate Commerce Commission if counsel thought it to be proper. After some delay Debtor prepared and filed with the Court and the Commission a Plan of Reorganization in substantial conformity with the proposals submitted by the Hattstaedt Committee and Canadian Pacific. This became known as the Debtor's Plan.

In the meantime another bondholders' committee known as the Clinkunbroomer Committee had been formed. This committee formulated and proposed its own plan and at the same time opposed the Debtor's Plan.

The Interstate Commerce Commission rejected the plan of the Clinkunbroomer Committee and approved the Debtor's Plan with minor modifications.

The Commission approved plan was submitted to the District Court of the United States for the District of Minnesota for approval or rejection and in granting its approval the court said inter alia:

> Turning now to the Plan approved by the Commission, it contemplates that all properties of the principal and subsidiary Debtors be vested in the reorganized company, which will then issue $5,000,000 of new 4% contingent interest bonds secured by a first mortgage on all properties of the reorganized company, and $10,500,000 of new capital stock consisting of 210,000 shares of common stock without par value but

having a stated value of $50 per share. $500,000 of this stock is to be issued on the basis of the reorganized company's acquisition of the properties of the Mineral Range.

In support of such a capitalization, the Commission's Report referred (p. 17) inter alia, to the evidence establishing the following facts. The Debtor's average net income available for fixed charges as adjusted, for the years 1928 to 1945 (excluding the so-called depression years of 1930 to 1933, inclusive, and the so-called boom years of 1942 to 1945, inclusive) was $312,468. On the basis of studies made by the officers and staff of the trustees and debtors, it was estimated that net earnings of the future normal year would amount to $312,468. Deducting from the anticipated normal year's net earnings of $312,468, $200,000 of interest on new bonds, federal income taxes at 38% on the remainder, and $25,000 as a sinking fund payment on the new bonds, there would be about $44,730 available for dividends on the new stock in the future normal year, or about 21 cents per share. On the basis of net earnings equal to those of 1936 or 1941, the income available for dividends on the new stock would amount to over $1 per share. Capitalized at 4%, $312,468 produces $7,811,700 and the 1936 and 1941 earnings produce $15,569,850 and $16,055,400, respectively. The Commission's Bureau of Valuation estimates of cost of reproduction less depreciation plus the value of lands and rights for the two Debtors produce a total of $16,515,858.

The Court concludes that it should approve the new capitalization as approved by the Commission.

The Commission's Plan proposes (in addition to cash distributions hereafter mentioned) the following divisions of the proposed issues of new bonds and stock as between (a) the $3,199,000 of Fives which were held on the effective da' of the Plan, January 1, 1945, by persons other than the Canadian Pacific and (b) the holder of $4,000 of the subsidiary Debtor's bonds, and (c) the Canadian Pacific as the then owner of $801,000 of Fives and of all other securities of the Debtor and of all other securities of the Mineral Range.

	Bonds	Stock
To the holders of $3,199,000 of Fives....	$1,919,400	.....
To the holder of $4,000 of Mineral Range Bonds	2,000	.....
To the Canadian Pacific.....	3,078,600	10,500,000
Total	$5,000,000	$10,500,000

80 F. Supp. 639 at 645.

• • • • •

At the hearing of April 25, 1956 counsel for appellant stated to the Appeal Board that it was the position of the railroad company that the Commission was required to make a determination of the value of the capital stock at the time of the organization of the corporation. It was argued that the Commission could not and should not accept the book value of the stock when it could be demonstrated that it was more than the actual value of the stock at the time of organization. Counsel for appellant stated we believe that for the purpose of computing this tax that we should be able to recalculate our opening balance sheet to restate it in terms of actual dollars. Counsel cited that portion of Section 4 of Act 183 P. A. 1952 which reads:

"For the purpose of this act only, each share of no par value shall be deemed to have the value of at least

> $1.00, or such value as shall have been fixed by the corporation for the sale of such stock, or the book value as determined by the Michigan corporation and securities commission, whichever may be the higher."

Counsel amplified his position by saying "I believe the statute should be read in reaching the book value as determined by the commission. I don't believe the commission can blindly accept the book value when a demonstration is made that the people who established that book value didn't believe it was market value."

To support its claim that the actual value of its common stock at the time of organization was less than the stated value of $50 per share, appellant offered the testimony of the witness Todhunter.

Mr. Todhunter identified himself as having been the counsel for the Hattstaedt Committee. He testified that the Hattstaedt Committee was a bondholders' protective committee representing the public holders of the mortgage Fives. Public holders did not include institutional investors such as insurance companies nor did it include the Canadian Pacific Railway Company. Todhunter recited that his Committee attempted to estimate the value of the property rights securing the mortgage Fives as distinguished from the property rights securing the other prior liens held by other security holders and to eventually determine the cash value of those rights. He stated that the bondholders represented by the Hattstaedt Committee were interested in investing pension funds and similar types of assets in securities having a fixed return and stability if they could be obtained. Consequently the Committee wanted to work out some way in the reorganization by which they could get their securities in bonds rather than partly in

bonds and partly in common stock. To accomplish this objective it would be necessary for the Committee to persuade Canadian Pacific to exchange some of its bonds for the common stock which would otherwise be issued under the plan to holders of Fives represented by the Hattstaedt Committee. It had previously developed that those holders of Fives represented by the Hattstaedt Committee would be entitled to receive only about 7% of any new bond issue upon reorganization with the balance of the bond issue going to Canadian Pacific for its first lien rights. The remainder of any allowable amount to the Hattstaedt Committee would upon reorganization be made up of common stock. In an effort to alter these conditions the Hattstaedt Committee negotiated with Canadian Pacific which agreed to exchange some of its bonds on reorganization for all of the common stock which would be issued to the Committee. Todhunter testified "It was therefore necessary to arrive at a basis for such an exchange." The Hattstaedt Committee in an effort to fix a basis for its exchange consulted with various investment bankers and ultimately came up with a figure from the investment people of $7.50 for the stock and $70 per hundred for the bonds. By subsequent negotiations with Canadian Pacific these values were accepted by both parties and were disclosed in the proposed plan of reorganization and in all of the proceedings before the Court and the Interstate Commerce Commission.

Appellant produced Vernon K. Boe, its tax commissioner, who testified that the adjustment in the amount of $9,495,310 shown on the asset side of the balance sheet at December 31, 1951 represents the total amount by which the assets of the company as they appear on the reports made to the Interstate Commerce Commission are written down to take into account the revaluation of the capital stock and surplus to what the company regarded as the

actual value as of the date of reorganization. He explained that the total of $9,495,310 was made up of the $8,866,200 adjustment in the value of the capital stock plus $692,110 which was an adjustment to surplus representing earnings of the company during the time of trusteeship and which it was believed the equity of the new stockholders included.

Witness Boe testified further that the price-earnings ratio of 7.78 used by appellant in its 1952 annual report to the Corporation and Securities Commission was obtained from Moody's Investment Service which had made an analysis for the year 1949 of the stock of 25 railroad companies which showed such stocks had been selling at an average of 7.78 times their earnings. Boe stated there was no relationship between the figure which his company used of 7.78 and the figure of $7.50 per share used by the Hattstaedt Committee.

Mr. Boe testified that his company presently computed the amount of the privilege fee owing on the 1952 return to be $4,866.46; that this sum was calculated by the application of the following factors, ratio and formula after adjusting the amount of the taxable surplus to include $850,000 of U. S. Government Bonds:

Computation of Fee for 1952 Based on Michigan Intrastate Net Ton Miles of Revenue Freight (Originating and Terminating in Michigan)

Freight Service			
Net ton miles of revenue freight	**61,031,000 (In Mich.)**	=	**Ratio in Michigan**
	677,639,000 (Total)		**9.00%**
Trackage			
Number of miles of all tracks operated	**558.37 (In Mich.)**		
	687.85 (Total)	=	**81.18%**
			2/90.18%
		Average ratio in Michigan	**45.09%**

Apportionment of Capital and Surplus and Computation of Privilege Fee

$1,633,800 (System paid-in capital) × 45.09% (average ratio) = $736,680 (Mich. portion) × 4 mills.....	$2,946.72
1,064,391 (Taxable portion of system surplus) × 45.09% (average ratio) = $479,934 (Mich. portion) × 4 mills	$1,919.74
Total privilege fee as computed by railroad company....	$4,866.46

* * * * *

Based on the foregoing method of computation proposed by the railroad company the difference between the Corporation and Securities Commission and appellant becomes:

Commission's figure, including filing fee..	$38,969.64
Appellant's figure	4,866.46
Difference	$34,103.18

* * * * *

Appellee called as its first witness Allen Weston, Director of the Railroad and Utilities Division of the State Board of Assessors, and General Property Consultant for the State Tax Commission. Weston identified Exhibit 8 as being the annual report of the appellant filed with the State Board of Assessors for the year ended December 31, 1951.

At an adjourned hearing before the Appeal Board held on May 17, 1956 appellee offered in evidence and the Board received Exhibit 9 being extracts from a publication by the Interstate Commerce Commission Bureau of Valuation showing the elements of value of property used in common-carrier service at January 1, 1952 of Class I Line Haul Railways. This exhibit shows three methods of valuing the property consisting of road and equipment of appellant, namely, (1) reproduction cost, new; (2) reproduction cost, less depreciation; (3) original cost. Under each method the valuation assigned does not include land and rights. The amounts shown on Exhibit 9 applicable to appellant are as follows:

Reproduction cost, new	
Road	$31,538,754
Equipment	7,979,284
Total	$39,518,038
Reproduction cost, less depreciation	
Road	$22,032,974
Equipment	4,794,283
Total	$26,827,257
Original cost	
Road	$16,481,547
Equipment	6,360,844
Total	$22,842,391

Attached to Exhibit 9 are notes explaining in detail the methods used by the Bureau of Valuation in arriving at cost under each of the three designated methods.

The Appeal Board received in evidence appellee's Exhibit 10 which was a verified copy of a sworn statement filed by appellant with appellee on December 12, 1949 for the purpose of obtaining admission to do business in the State of Michigan as a foreign corporation. Exhibit 10 shows the total value of the property owned by appellant at November 21, 1949 to be (taken from the balance sheet estimates) $18,193,727.27. Of this total $14,356,687.69 was allocated to Michigan and the remainder of $3,837,039.58 was allocated without Michigan. The book value of the common stock was shown on Exhibit 10 to be $50 per share.

Appellee's Exhibit 11 was a statement taken from the balance sheet as of December 31, 1953 and supplementing the information contained on Exhibit 10 previously filed

with the Commission. Exhibit 11 shows the following condition of appellant at December 31, 1953:

Total value of property owned by appellant	$22,555,547
Total amount of business transacted during the year	$ 8,149,401
Total	$30,704,948

The foregoing amount of $30,704,948 may be allocated from the exhibit as follows:

Within Michigan

Total value of property owned	$17,554,891
Business during the year	$ 6,946,295
Total	$24,501,186

Without Michigan

Total value of property owned	$ 5,099,656
Business during the year	$ 1,203,106
Total	$ 6,203,762

Exhibit 11 shows the stated value of the common stock to be $50 per share and the price fixed for sale per share at $7.50 which latter sum is footnoted by a statement showing how the value of $7.50 per share was determined.

Appellee's Exhibits 12, 13 and 14 are extracts from published reports of statistics of railways prepared by The Bureau of Transport Economics and Statistics and printed by the U. S. Government Printing Office. Exhibit 12 relates to the year ending December 31, 1949; Exhibit 13 relates to the year ended December 31, 1950; and Exhibit 14 relates to the year ended December 31, 1951. The salient portions of these exhibits as they relate to the appellant and appellant's predecessor company in the reorganization are stated on the following tabulation:

COMPARATIVE ANALYSIS OF GENERAL BALANCE SHEET STATEMENTS—EXHIBITS 12, 13 AND 14

ASSET SIDE	For the year ended December 31, 1949 (Exhibit 12) D, SS & A Ry.Co.	For the year ended December 31, 1949 (Exhibit 12) D, SS & A R.R.Co.	For the year ended December 31, 1950 (Exhibit 13) D, SS & A R.R.Co.	For the year ended December 31, 1951 (Exhibit 14) D, SS & A R.R.Co.
Investments	Note 1			
Investments in road and equipment property, other physical property, affiliated companies, etc., less recorded depreciation and amortization. Total.....	$46,738,970	$16,037,656	$16,131,102	$17,198,166
Current Assets				
Cash, temporary investments, materials and supplies, accounts receivable, etc. Total.....	4,261,600	2,955,195	3,643,836	3,653,479
Deferred Assets				
Total.....	41,323	54,548	47,656	62,728
Unadjusted Debits				
Total.....	634,993	86,017	1,071,817	71,102
Grand Total	$51,676,886	$19,133,416	$20,894,411	$20,985,475

COMPARATIVE ANALYSIS OF GENERAL BALANCE SHEET STATEMENTS—EXHIBITS 12, 13 AND 14

LIABILITY SIDE	For the year ended December 31, 1949 (Exhibit 12)		For the year ended December 31, 1950 (Exhibit 13)	For the year ended December 31, 1951 (Exhibit 14)
	D, SS & A Ry.Co.	D, SS & A R.R.Co.	D, SS & A R.R.Co.	D, SS & A R.R.Co.
Capital stock	$22,000,000	$10,500,000	$10.500,000	$10,500,000
Long term debt Total	26,176,972	6,761,272	7,570,361	6,966,716
Current liabilities Total	792,350	991,529	1,124,027	1,201,029
Deferred liabilities Total	32,935,173	140,723	180,322	320,092
Unadjusted credits Total	244,750	282,104	250,856	304,137
Surplus				
Unearned surplus	11,312			
Earned surplus—Appropriated.		75,000	100,000	125,000
Earned surplus—Unappropriated	30,483,671	382,788	1,168,845	1,568,501
Grand Total	$51,676,886	$19,133,416	$20,894,411	$20,985,475

In addition to the Witness Weston who testified at some length on the valuation of railroad property, appellee produced Pauline Detzler, employed by appellee, who explained the filing of Exhibits 10 and 11 with the Commission.

CONCLUSIONS OF LAW

At the time of filing its 1952 annual report with appellee the appellant raised various questions of law attacking the validity of the imposition of a privilege fee on it. These have been summarized under five headings at page 6 hereof. While this apeal board does not possess the judicial power of a court to construe statutes regarding their validity and constitutionality (Detroit Mortgage Corporation v. Secretary of State, 211 Mich. 320) it is at least a quasi judicial body. Our Supreme Court has recognized that the functions performed at the Commission level are of this character regarding the computation of the privilege fee. In re Appeal of Hoskins Manufacturing Co., 270 Mich. 592, 598. Surely the functions of this board on appeal are of equal or greater stature. We deem it appropriate to comment briefly on the five grounds of protest assigned by appellant.

As to its first objection appellant says that Act 210 P. A. 1952 was not in effect in time to require appellant to file an annual report in that year and that the subsequent enactment of Act 270 P. A. 1952 which was given immediate effect did not result in subjecting appellant to the requirement of filing its annual report by August 31, 1952. The Board is of the opinion that there is no merit in this contention. A similar issue was before the Supreme Court in the case of United Insurance Co. v. Attorney General, 300 Mich. 200 where the legislature attempted to give im-

mediate effect to an act which it had previously enacted at the same session and which had been approved and signed by the Governor and filed in the office of the Secretary of State by adopting concurrent Senate and House resolutions containing the immediately effective provision. The Supreme Court condemned this practice and held the adoption of the concurrent resolution to be ineffectual. The court pointed out that under Article 5, Section 21 of the State Constitution the legislature was required to determine whether a measure was sufficiently necessary for the preservation of the public peace, health or safety to be entitled to the privilege of being made immediately effective. The court said that the Governor by virtue of his veto power had the legislative duty as well as both houses of the legislature to consider whether a measure falls within the categories to which privilege of immediate effect may be given. The court pointed out that concurrent resolutions would never be presented to the Governor and he therefore had no opportunity to exercise his legislative duty regarding the qualification of the provision under the constitutional requirement. In condemning the action of the legislature the court said "For that reason it is unconstitutional." In the enactment of Act 270 P. A. 1952 the legislature re-enacted Act 210 but gave Act 270 immediate effect. Before Act 270 became law the enrolled bill by which it passed the legislature must have been presented to the Governor giving him the right to exercise his veto power if in his opinion the immediate effect provision did not meet the constitutional test. He was therefore not deprived of his legislative function and there can be no valid objection to the procedure adopted by the legislature and the Governor in the passage of Act 270 P. A. 1952.

In its second and third grounds of protest appellant claims that the privilege fee constitutes double taxation, is an ad valorem property tax not an excise tax or specific tax and that its imposition amounts to the taking of property without due process of law and is a denial to appellant of the equal protection of the laws. We think the privilege fee in question is a specific tax. Our Supreme Court has so held. There is no double taxation nor denial to appellant of due process or equal protection of the laws if the corporate privilege fee is a specific tax. We consider the following decisions dispositive of these issues:

Union Steam Pump Sales Co. v. Secretary of State, 216 Mich. 261

In re Detroit Properties Corp., 254 Mich. 523

Shivel v. Kent County Treasurer, 295 Mich. 10

In re Nelson Brothers Co., 297 Mich. 566

Chicago, Duluth & Georgian Bay Transit Co. v. Corporation & Securities Commission, 319 Mich. 14

Lake Shore Coach Lines, Inc. v. Secretary of State, 327 Mich. 146.

Appellant insists that Act 183 is void because it contravenes the provisions of Section 1 of Article 10 of the Michigan Constitution in that the franchise of appellant to carry on its business was a subject of taxation contributing to the primary school interest fund under laws in effect at the time the present Constitution became effective and that to now tax the same property by a privilege fee payable into the general fund of the state violates the Section 1 provision. In the opinion of the members of the board this contention was fully answered by the court's opinion in the case of Union Steam Pump Sales Co. v. Secretary of State, 216 Mich. 261 at 268 et seq. See also Ray Corporation v. Secretary of State, 241 Mich. 457, 463.

Appellant says that Act 183 contravenes Section 6 of Article 10 of the Constitution because it does not distinctly state the tax. As bearing on this issue see Shivel v. Kent County Treasurer, 295 Mich. 10.

The privilege fee, or franchise tax as it is sometimes called, in Michigan is imposed upon the paid-up capital and surplus. The principal issue in this case is the method to be employed in determining the amount of the paid-up capital of appellant. In this regard the members of the Appeal Board think that the testimony of the witness Todhunnter concerning an agreed price of $7.50 per share at the time of the exchange agreement with the Canadian Pacific may be disregarded. It is necessary to understand the nature or character of the privilege fee imposed in Michigan. Our court has said "the tax in question is not one upon interstate or foreign commerce, but a privilege tax imposed as an incident to the right to be a corporation, and exercise corporate functions by means of paid-up capital and surplus. In re Detroit & Windsor Ferry Co., 232 Mich. 574, 578. It is not a tax upon the proceeds of the business of the corporation. * * * It is a fee imposed by law for the privilege of exercising its franchise and of transacting its business within this State. In re Detroit International Bridge Co., 257 Mich. 52, 59. The fee is payable for the privilege of exercising the corporate franchise whether it is exercised or not. Detroit International Bridge Co. v. Corporation Tax Appeal Board, 267 Mich. 384, 385; affirmed 294 U. S. 83, 79 L ed 777. Properly speaking capital of a corporation signifies the actual property or estate of the corporation whether it exists in the form of money or property or both. It is the property of the corporation, not of the stockholders. On the other hand shares of stock represent the individual interest or right of the stockholder in the management of the corporation and to

share in its profits and in its property and assets upon dissolution. The interest or right of the stockholder in the corporation is the same where evidenced by shares of no-par stock. The Minnesota Supreme Court recognized this rule when it said "Non-par stock certificates evidence the fact that the original holders thereof have contributed to the capital. * * * A share of non-par value stock represents an aliquot interest in the money and assets constituting its capital." Jacques v. Missabe Electric Co., 172 Minn. 303, 305.

Sometimes the term capital stock is employed. It has been said "The capital stock * * * is the amount paid in or secured to be paid in by the stockholders upon which it is to conduct its operations, and is the property of the corporation itself. A share of stock, on the other hand, is the interest or right which the owner has in the management of the corporation, * * * and the shares of stock belong to the individual stockholders, and not to the company * * *." §5084 Fletcher Cyclopedia Corporations, Permanent Edition, Vol. 11. Because the privilege fee or tax in Michigan is a tax against the corporation as such in the exercise of its franchise and is not a tax against the individual stockholders it is immaterial what value the stockholders such as the Hattstaedt Committee place on shares in negotiating a sale or some exchange agreement. Such evidence does not establish the amount of the capital or capital stock of the corporation.

Appellant was organized pursuant to the provisions of Chapter 300, Laws of Minnesota, 1933. Section 1 of that act contains the definitions. Subsection X of Section 1 provides:

> The stated capital of a corporation at any time is
>
> (a) the sum of

(1) • • •

(2) The aggregate amount of consideration received for all its shares without par value theretofore allotted, whether than outstanding or not, except such portion thereof as shall have been designated as paid-in surplus pursuant to Section 20 of this Act.

(3) • • •

Fletcher in his work gives this definition. "Stated capital of no par value stock corporation is, generally speaking, the total consideration received, or to be received, for the aggregate of the no par shares issued." §5080.

Appellant did not in this record refer to the amount of $10,500,000 as representing its stated capital nor did it undertake to offer evidence of the aggregate amount of consideration received by the corporation in the form of property or otherwise for the issuance of its no-par shares. The only evidence of physical values of property must be gleaned from the proceedings before the Interstate Commerce Commission and the Federal District Court. Neither did the appellant produce evidence to show how the stated value of $50 per share was determined. There is nothing in this record to show any action by the board of directors or otherwise. Instead appellant undertakes to show that the shares of stock are not worth their stated value and arrives at a hypothetical amount as a substitute for the sum of $10,500,000 by capitalizing earnings on an earnings ratio of 7.78 to earnings it first deducted from the teresting to note that before appellant applied its earnings ratio of 7.78 to earnings it first deducted from the operating income of the railroad interest on the outstanding bonds at 4% computed at face value of one hundred,

plus interest on outstanding equipment obligations so that the net result was to capitalize earnings after deducting interest (Tr. pp. 96, 97, 98). Stated in another way, by employing this method the total capitalization of the company would consist of the face value of the equipment certificates, the face value of the bonds, and 7.78 times the earnings available for common stock.

The problem of determining paid-up capital is somewhat more complex where the contribution to capital made by the original stockholders is evidenced by no-par stock than where it is evidenced by shares having a fixed par value. But this does not mean that capital cannot be determined where no-par stock is issued and the contributions in toto by the original stockholders are ascertainable in fixing the amount of paid-up capital although the contributions may consist of property or other thing of value instead of a flat one hundred dollars per share. The appellee Commission recognizes that it must make a determination of the amount of paid-up capital where no-par shares are involved and our Supreme Court has discussed some of the ramifications of this problem in arriving at the amount of the privilege fee to be imposed in such a situation. See Detroit Mortgage Corporation v. Secretary of State, 211 Mich. 320. In the instant appeal no Minnesota statute has been cited comparable to that existing in Delaware relied on in the foregoing decision. The applicable Michigan statute is contained in Section 4 of Act 183 P. A. 1952 and reads "For the purpose of this act only, each share of no par value shall be deemed to have the value of at least $1.00, or such value as shall have been fixed by the corporation for the sale of such stock, or the book value as determined by the Michigan corporation and securities commission, whichever may be the higher." The members of the Appeal Board are aware of the incongruity

existing in Michigan law. As has been pointed out the Michigan privilege fee is assessed upon capital and not upon the value of shares of stock. But the above quoted portion of the statute deals with the value of shares and not with the value of contributions to capital where the stock issued by the incorporators has no-par value.

In determining the amount of capital of appellant created by the contributions of the shareholders, the appellee Commission in this case used the book value of $10,500,000 as returned by the corporation on its 1952 annual report. There is evidence in the record in the proceedings before the Interstate Commerce Commission and the Federal District Court from which the Commission could have found that the contributions of the shareholders to capital equaled or exceeded this stated figure. The testimony of the witness Weston supports the appellee in this regard. Upon this record there is no evidence from which this Appeal Board can find that such determination by the appellee Commission was erroneous or amounted to an abusive exercise of its discretion. Therefore the Appeal Board concludes that on this issue the determination of capital made by the Corporation and Securities Commission was proper and it is approved.

Another point of contention in this matter is the amount of surplus to be used in the apportionment formula. The pertinent portion of Section 4 Act 183 P. A. 1952 provides:

> The term "surplus", as used in this act, shall be taken and deemed to mean the net value of the corporation's property, less its outstanding indebtedness and paid-up capital; but in no case, either as to domestic or as to foreign corporations, shall any deduction be made from the item of paid-up capital, in computing the franchise fee thereon, by reason of any impairment of th same.

The appellee Commission contends that it followed the requirements of the statute in determining the total amount of the surplus of appellant to which it applied the apportionment formula. The appellee says that to determine the net value of the corporation's property it added the following amounts from the asset side of the balance sheet of December 31, 1951 (Exhibit 3):

Total investments	$17,198,164.35
Total current assets	3,653,478.85
Total deferred assets	62,729.17
Total unadjusted debits	71,102.83
	$20,985,475.20

The appellee Commission determined the statutory deduction of it (taxpayers') outstanding indebtedness and paid-up capital by adding the following amounts from the liability side of the balance sheet:

Outstanding indebtedness	
Total long-term debt	$ 6,966,716.06
Total current liabilities	1,201,029.29
Deferred liabilities	320,091.97
Unadjusted credits	304,137.06
	$ 8,791,974.38
Paid-up capital	10,500,000.00
	$19,291,974.38

The Commission then arrived at surplus under the statute by netting these sums:

$20,985,475.20
19,291,974.38
$1,693,500.82

The resultant figure is the amount which the Commission used in apportioning surplus to Michigan in the computation of the tax. See page 5, supra.

Appellant computed "surplus" under the statutory provision by the following method:

Total investments	$ 7,702,854.35	(Note 1)
Total current assets	3,653,478.85	(Note 2)
Total deferred assets	62,729.17	
Total unadjusted debits....	71,102.83	
	$11,490,165.20	

Note 1. The difference between this sum and the corresponding item in the Commission's computation is $9,495,310 shown as a credit to "Adjustments on the asset side of the balance sheet, Exhibit 3." The $9,495,310 is the sum of $8,866,200 (which is the difference between the "stated value" of $10,500,000 for the stock and appellant's "market value" of $1,633,700) and $629,110 (representing "surplus paid-in in the reorganization exchange" according to appellant).

Note 2. Originally appellant claimed this total should be $2,803,478.85, the difference being a credit to "Adjustments of $850,000 representing U. S. Gov't Securities. Since appellant has now abandoned its claim of exemption as to these securities they have been included in the total, making the amount $3,653,478.85.

Outstanding indebtedness

Total long-term debt	$ 6,966,716.06
Total current liabilities	1,201,029.29
Deferred liabilities	320,091.97
Unadjusted credits	304,137.06
	$ 8,791,974.38
Paid-up capital	1,633,800.00
	$10,425,774.38

Surplus resulting from the difference in appellant's figures is

$11,490,165.20
10,425,774.38
$ 1,664,390.82

This is the amount which appellant now claims should be used in apportioning surplus to Michigan. In its 1952 annual report appellant considered "Taxable surplus" to be $214,391. Adding $850,000 representing U. S. Government securities brings the amount of "Taxable surplus" to $1,064,390.82 from which the apportionment to Michigan is determined. See page 16, supra.

The foregoing calculations disclose that the appellee Commission determined the "surplus of the appellant to be $1,693,500.82." Appellant's corresponding determination produced a figure of $1,064,390.82. The difference is $629,110.20. Appellant has variously designated this latter sum. It called it "Surplus as of November 1, 1949 (Value of property exchanged for stock fully reflected stockholders' equity in assets)" in the notes to the balance sheet filed with appellee as a part of the 1952 annual report. In the

same notes to the balance sheet appellant on another page designated this sum as Surplus paid-in in the reorganization exchange and under the heading "Taxable surplus" on page 2 of the notes appellant said: Of this amount $629,110 represents the book surplus set up on the books of the reorganized company immediately after the reorganization. Taxpayer contends that the fair market value of the capital stock issued in the reorganization exchange represented the equity of the new stockholders in the aggregate assets of the reorganized company including earnings and profits accumulated during bankruptcy proceedings.

In its brief filed with this Appeal Board, appellant explained its position this way (p. 9):

> "The franchise tax return filed by the Railroad Company for the year 1952 set forth the balance sheet as of December 31, 1951, according to the books of the company and incorporated certain adjustments to show the actual value of the stock as of the date of reorganization. Since all the stock was in the hands of one holder there was no trading in the stock in the market and no sale price could be ascertained. The value stated in the return was based on a capitalization of net railway operating income of the Railroad Company for a five-year period after interest on bonds and equipment obligations was deducted. The average net income over this period was multiplied by the price earnings ratio for 25 railroads making up the railroad index of Moody's Investment Service, and produced a valuation of the DSS&A. stock of $1,633,800, or approximately $7.78 per share. The surplus account was adjusted by deducting $629,110, representing earnings of the company between the effective date of the plan and the date of consummation of the reorganiza-

> tion on the theory that the capitalized earnings computed as aforesaid fully reflected the value of both capital stock and the paid-in surplus as of the date of consummation of the plan of reorganization."

The effective date of the Plan was January 1, 1945 (Report of the Interstate Commerce Commission, Exhibit 2, p. 30). It is not clear from this record precisely what is meant by "the date of consummation of the plan of reorganization." The witness Boe testified that Appellant's Exhibit No. 4 is the balance sheet "as of November 1, 1949, the date of the consummation of the new company, * * *." He testified that the exhibit is a true and accurate representation of the figures as they appear on the books of the company of the opening entries of the new corporation (Tr. pp. 83, 84).

Exhibit 4 shows on the liability side the following two entries:

Surplus	
Earned surplus—Appropriated	$ 75,000
Earned surplus—Unappropriated	554,110
Total surplus	$629,110

There also appears on the balance sheet, appellant's Exhibit 4, the following:

> "Note: In accordance with Minnesota Law, Earned Surplus at November 1, 1949, in the amount of $629,110.00 is designated as 'Paid in Surplus.'"

Counsel for appellant has not cited the section of the Minnesota law which provoked the footnote to the balance sheet of November 1, 1949. We assume the reference is to

Subsection VI of Section 20 of Chapter 300, Laws of Minnesota, 1933, which reads:

> "VI. All contributions by shareholders to a corporation shall constitute paid-in surplus."

Despite the confusing designations of the sum $629,110, the most that can be said on this record for the appellant's contention is that this amount represents net earnings, interest and like accumulations during that period of operation of the Debtor and the Subsidiary Debtor under trusteeship between the effective date of the Plan, January 1, 1945, and the consummation of the reorganization which we assume to be November 1, 1949. We take it that appellant argues this amount should not now be includable in surplus for the purpose of computing the privilege fee because Canadian Pacific, the sole stockholder of appellant, became entitled as a creditor in the bankruptcy proceedings to this sum which in effect it contributed to capital by virtue of the application of the earnings ratio in determining the number and stated value of the no-par shares which it was to receive under the reorganization plan. At best appellant's position is contentious and debatable. There is no "error" or "incorrectness" as found by the court to exist in the Hoskins case (270 Mich. 592). The plain answer to appellant on this point is that the amount of $629,110 was recorded per books as "paid-in surplus" as the Minnesota statute required and was properly calculated by the appellee Commission in determining "surplus" as defined in Section 4 of Act 183 P. A. 1952. We find no error on the part of the Commission in this regard.

As we view it, in making its determination of paid-up capital and surplus the appellee Commission is under no duty to make an independent audit and appraisal of the property of a taxpayer in determining the amount of the

privilege fee to be imposed. The Commission is entitled to accept the book entries unless there is clear and convincing evidence of error or irregularities which show the book entries to be distorted, inaccurate, or misleading. This conclusion was recognized by our Supreme Court in the Hoskins case, supra. We find no evidence in this record which requires this Board to upset the determination of paid-up capital and surplus as made by the Corporation and Securities Commission.

THE GARTLAND AND PANHANDLE DECISIONS

At the presentation of this matter before the Appeal Board, appellant contended that the decisions by the Supreme Court in Gartland Steamship Company v. Corporation & Securities Commission, 339 Mich. 661 and Panhandle Eastern Pipe Line Company v. Corporation & Securities Commission, 346 Mich. 50 require a redetermination of the amount of the privilege fee based upon a review apportionment formula.

We think appellant's counsel misconstrued the holdings of our Supreme Court in these decisions. In the Gartland case the factors used by the Corporation and Securities Commission in the apportionment formula were condemned by the court. The court said that the Commission's inclusion of tonnage transported in interstate and foreign commerce was wrong and the use of this factor deprived Gartland of its property without due process of law. The court ordered the amount of the privilege fee recomputed, excluding in the redetermination "any and all cargoes transported in interstate and foreign commerce." In the subsequent case of D. & C. Navigation Co. v. Department of Revenue, 342 Mich. 234 at 243 the court explained its holding in the Gartland case by saying:

> "In Gartland Steamship Co. v. Corporation & Securities Commission (1954), 339 Mich. 661, this Court was concerned with the imposition of a corporation franchise tax on a steamship company. While we reversed and ordered a recomputation, we upheld the liability of the company for the tax, if based on a formula reasonably apportioning business done within the State."

In the concluding paragraph of the Panhandle case the court states its position by saying:

> "In the case at bar the major part of plaintiff's business is interstate business, completely severable and unrelated to its intrastate business. * * * In our opinion it is clear that the formula used by the commission includes receipts from a business not related to plaintiff's intrastate business, and under the authority of the Gartland Case supra, it is arbitrary and imposes an unjust burden upon interstate commerce."

It ordered the apportionment formula adjusted in the recomputation of the privilege fee under the provisions of Section 5e of the act.

It must be borne in mind that the tax or fee involved in this proceeding like that involved in Gartland and Panhandle is in effect a tax levied upon the capital and surplus of the taxpayer in the State of Michigan determined by use of an apportionment formula. The subject of taxation is capital and surplus and in that respect differs materially from a tax levied upon receipts or specific corporate activities such as transmission of telegraphic messages. The "receipts" or gross receipts cases condemn the inclusion in the tax base of revenue derived from interstate commerce "Where the subjects of taxation" (re-

ceipts) can be separated as to their source. If "that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the State, the court will act upon this distinction, * * *." Of course it will. That is the holding in Ratterman v. Western Union Telegraph Co., 127 U. S. 411, 32 L. ed. 229, cited and quoted in both the Gartland and Panhandle decisions. To hold otherwise would be to tax receipts derived from transactions in interstate commerce—a direct tax on interstate commerce.

But a different rule of law applies where the subject of taxation is paid-up capital and surplus albeit in allocating to the taxing state its share a formula is applied which may embrace corporate activities involving interstate commerce. This was recognized in the Ratterman case itself where the Supreme Court of the United States after citing Western Union Tel. Co. v. Attorney General of Massachusetts, 125 U. S. 530, said:

> "The court held in that case that this tax, being in effect levied upon the capital stock or property of the Company in the State of Massachusetts, which was ascertained upon the basis of the proportion which the length of its lines in that State bore to their entire length throughout the whole country, and not upon its messages or upon the receipts for such messages, was a valid tax."

The D. & C. Navigation Company case involved the Michigan sales tax imposed upon the seller for the privilege of making retail sales within Michigan and is measured by the gross proceeds of such sales. The tax was challenged because it was said it was impossible to isolate each sale and determine whether or not it was made within Michigan's jurisdiction. The court had no trouble with the for-

mula adopted in arriving at an allocation to Michigan of gross proceeds and said:

> "Once it has been decided that a particular transaction is subject to a tax, we are not obliged to invalidate the tax because the only method of determining the amount of liability is by a reasonable formula. It is the economic relation of the activity to commerce that determines the validity of the tax. If the State is within its constitutional rights in taxing the sales we think it may adopt a reasonable method for determining the actual liability and the amount of the sales."

As a guide to the proper interpretation of the Supreme Court's decision in the Gartland and Panhandle cases the quotation of pertinent language from a previous opinion by the court is most beneficial. The case of In re Detroit & Windsor Ferry Co., 232 Mich. 574 involved the imposition of the privilege fee against the ferry company which was a Michigan corporation. The principal business of the corporation was the operation of the ferryboats to Windsor and Bob-Lo, Canada, and to Belle Isle in the State of Michigan. Speaking of the tax the court said (p. 576):

> "The ferry company is a Michigan corporation, and its property is located in Michigan. Its principal business is foreign commerce. The tax imposed is a specific tax—an excise tax (citing authorities). It is not a property tax. It in no way interferes with interstate or foreign commerce.
>
> The act makes reference to the capital and surplus and takes them into account in fixing the tax, but the reference is not for the purpose of taxing the property but to determine what is a fair price to charge for the

> franchise privileges. The owners of the company are at liberty at any time to operate its boats in foreign commerce as individuals without the payment of this tax."

and at page 578:

> "The rule is too well settled that a State may not impose a tax upon interstate or foreign commerce to require the citation of authority. It is equally well settled that the privilege tax here involved is not one upon interstate or foreign commerce."

Turning to the apportionment formula used in the instant proceedings the Appeal Board is of the opinion that the determination made by the appellee Commission was proper and that no redetermination is necessary or appropriate by virtue of the Gartland and Panhandle decisions. In determining the Michigan ratio from the factor applicable to net ton miles of revenue freight the appellee used as the numerator the figure 532,709,000 and as the denominator 677,639,000 and arrived at a ratio of 78.6125% (see pages 4 and 5 supra). The difference between the denominator and the numerator so used is 114,930,000 all of which is assignable to Wisconsin as shown on Schedule 28 of appellee's Exhibit 8. Stated otherwise, of appellant's net ton miles of revenue freight for its entire system, 78½% is assignable to Michigan business and 21½% is assignable to Wisconsin business. In its Exhibit 7 appellant computes the ratio in Michigan as to this factor to be 9%. It arrives at the 9% computation by substituting for the numerator of 532,709,000 previously used a new numerator of 61,031,000 which it says represents Michigan intrastate net ton miles of revenue freight (originating and terminating in Michigan). The members of the Appeal Board believe that to reduce the ratio in Michigan of appellant's

net ton miles of revenue freight from approximately 78½% to 9% completely distorts the freight business of appellant in Michigan. Appellee's Exhibit 8 shows on Schedule 28 the following information:

	System	Michigan
Tons-Revenue freight	3,822,179	3,796,930
Freight locomotive miles...	1,117,461	939,325
Freight revenue	$7,480,245	$6,327,474
Tons of freight on Line-Originated	1,926,388	1,902,194
Tons of freight on Line-Terminated	704,394	675,696

We conclude that the factor of a net ton miles or revenue freight as used by the appellee Commission does not unreasonably burden interstate commerce nor unlawfully deprive appellant of its property without due process of law.

ORDER

It is ordered that the total privilege fee as computed by the appellee Commission in the amount of $38,967.64 together with the filing fee of $2.00 aggregating $38,969.64 is proper and the same is approved.

Michigan Corporation Tax Appeal Board
By Thomas M. Kavanagh, Chairman,
Charles W. Lentz, Member.

Dated at Lansing, Michigan, this 25 day of January, 1957.

OPINION OF MICHIGAN SUPREME COURT

STATE OF MICHIGAN—IN THE SUPREME COURT

Duluth, South Shore & Atlantic Railroad Company, a Minnesota Corporation,
Petitioner and Appellant,
v.
Michigan Corporation and Securities Commission and Michigan Corporation Tax Appeal Board,
Defendants and Appellees.

Before the Entire Bench, Except Kavanagh, J.

Edwards, J.

The Duluth, South Shore & Atlantic Railroad Company is a Minnesota corporation engaged primarily in hauling iron ore and freight to and from Minnesota and Wisconsin and Michigan's upper peninsula. Five hundred and fifty-eight miles of its tracks, 81% of the total, are within the borders of Michigan. Of all net ton miles of revenue freight hauled in 1951, 532,709,000 miles, or 78%, were hauled in Michigan. Most of this freight moved between States with only 61,031,000 miles of it, or 9% of the total, representing freight miles between loading and unloading points located in Michigan.

In 1952 the Michigan legislature sought to include railroads under then-existing legislation (C. L. 1948, §450.301 et seq. (Stat. Ann. §21.201 et seq.)) requiring the payment of a franchise and privilege fee by each domestic and foreign corporation. These amendments which are ap-

plicable to railroad corporations were P. A. 1952, Nos. 183 and 270 (C. L. S. 1952, §§450.304, 450.305b, 450.82 (Stat. Ann. 1953 Cum. Supp. §§21.205, 21.208(2))). These amendments were given immediate effect as of April 29 and June 12, 1952.

On August 28, 1952, appellant filed a report and paid under protest the sum of $5,908.45 which it claimed to be the amount due under P. A. 1952, No. 183, if such was constitutional.

On April 13, 1953, the corporation and securities commission issued a determination rejecting the railroad's computation and computing the tax as follows:

"April 13, 1953

"Duluth, South Shore & Atlantic Railroad Company
1824 First Nat'l Soo Line Bldg.
Minneapolis 2, Minnesota

"Gentlemen:

"On September 2 we received your 1952 Michigan Annual Report with $5,908.45.

"The privilege fee is computed on the paid in capital and surplus as shown by the books of a corporation as of close of its fiscal or calendar year next preceding the time for filing. U. S. Government securities and paid in capital surplus are not allowable deductions from surplus in computing the fee.

"We find the average ratio to be .798943. Applying this to paid in capital of $10,500,000 and surplus of $1,693,500 at rate of 4 mills on the dollar results in

$38,969.64 including $2 filing fee. Kindly remit balance due of $33,061.19.

"Very truly yours,

/s/ Ann Sawasky,
"Director, Annual Reports"

The railroad then appealed this determination to the Michigan corporation tax appeal board which, after hearing, approved the fee as computed by the commission; and from this decision the railroad brings this appeal to this Court.

Before we detail and deal with the issues presented on appeal, some additional facts must be stated:

The appellant railroad was incorporated under the laws of Minnesota on October 19, 1949, and on November 1, 1949, it acquired the assets of Duluth, South Shore & Atlantic Railway Company and of Mineral Range Railroad Company. This acquisition was pursuant to a reorganization of these 2 railroads under section 77 of the United States bankruptcy act, as amended, by virtue of which appellant purchased these assets. It paid for them by the issue of 210 shares of stock of no par value but with a stated value of $50 a share, and $5,000,000 in face value of 4% bonds. It has issued no additional stock so that at the time of filing its annual report for 1952 its outstanding paid-in capital consisted of these 210,000 shares. All of this stock was issued to and is owned by the Canadian Pacific Railway Company. None of it has ever been sold. This reorganization, appellant's issue of stock and its purchase of the assets of the old railroads, was subject to the approval and authorization of the interstate commerce com-

mission and the district court of the United States for the District of Minnesota, fourth division.

Judge Gunnar Nordbye's opinion approving the reorganization plan recited certain other relevant facts:

> "The debtor operates lines of railroad extending from Sault Ste. Marie, Michigan, and from St. Ignace, Michigan, westward to Soo Junction, Michigan, where they join, thence westward through Marquette, Michigan, to Nestoria, Michigan, thence northward from Nestoria to Houghton, Michigan, and westward from Nestoria to Marengo, Wisconsin, thence westward through Ashland, Wisconsin, and Superior, Wisconsin, to Duluth, Minnesota, comprising 425 miles of main line, 21 miles of branch line, and 102 miles of leased line, a total of approximately 548 miles. The cost of reproduction of the principal debtor's property less depreciation plus value of land and rights amounted to $15,717,941, as of December 31, 1944, according to the report of the interstate commerce commission's bureaus of valuations.
>
> "The portion of the lines extending from Marquette through Nestoria to Houghton was formerly owned and operated by the Marquette, Houghton & Ontonagon Railroad Company, and is known as MH&O mortgage district. The remaining portions of the debtor's railroad, extending westward from Nestoria and eastward from Marquette, are collectively known as the DSS&A mortgage district.
>
> "The debtor also operates in connection with the above railroads, the railroad of the Mineral Range, 26 miles long, extending from Houghton, Michigan, through Hancock to Calumet, Michigan. The cost of

reproduction of the Mineral Range Railroad, less depreciation plus value of land and rights, was $797,917 as of December 31, 1944, according to the report of the commission's bureau of valuations. This railroad has value principally as a feeder to the debtor's lines.

"On January 2, 1937, the debtor began this proceeding by filing in this court a petition showing that it was unable to met its debts as they matured and that it desired to effect a plan of reorganization pursuant to section 77 of the bankruptcy act. The debtor's obligations at that time included, in addition to large amounts of unsecured debt, the following amounts of debt secured by outstanding mortgages of its properties:

"Bonds secured by the MH&O 6% Mortgage of 1885 (herein after called Sixes) assumed by the principal debtor..	$ 1,400,000
"Bonds secured by the DSS&A 5% First Mortgage of 1887 (hereinafter called Fives)	4,000,000
"Bonds secured by the DSS&A Consolidated Mortgage of 1890 (hereinafter called Fours)	15,107,000
"Unpaid interest on Fours.....	21,599,315
"Total	$42,106,315

"On January 30, 1937, the court appointed 2 trustees in bankruptcy: Mr. James L. Homire who was nominated by counsel for the Prudential Insurance Company which owned $416,000 of the Fives, and Mr. E. A. Whitman who was nominated by counsel for the Canadian Pacific Railway Company. Mr. Homire has since resigned, and Mr. Whitman is deceased. Mr. P. L. Solether is now the sole trustee.

"On July 1, 1937, the Mineral Range filed in this court a petition showing that it was unable to meet its debts as they matured, and praying that it be allowed to effect a plan of reorganization in connection with the plan to be effected for the debtor. The outstanding obligations of the Mineral Range at that time included, in addition to large amounts of unsecured debt and equipment trust obligations, $1,598,675 of principal and $231,912 of unpaid interest owing on bonds secured by mortgages of its properties.

"Persons other than the Canadian Pacific held $3,199,000 of the debtor's Fives; an individual bondholder held $4,000 (reduced to $2,800 by subsequent payment) of Mineral Range bonds; and the Canadian Pacific owned directly or indirectly all of the other outstanding bonds of both the debtor and the Mineral Range."

As indicated above, the great majority of bonded indebtedness was due the Canadian Pacific Railway, with $3,203,000 held by other persons or insurance companies.

After lengthy discussion of various proposed plans for reorganization, the federal court approved a new capitalization plan proposed by the interstate commerce commission, as follows:

"Turning now to the plan approved by the commission, it contemplates that all properties of the principal and subsidiary debtors be vested in the reorganized company, which will then issue $5,000,000 of new 4% contingent interest bonds secured by a first mortgage on all properties of the reorganized company, and $10,500,000 of new capital stock consisting of 210,000 shares of common stock without par value

but having a stated value of $50 per share. $500,000 of this stock is to be issued on the basis of the reorganized company's acquisition of the properties of the Mineral Range.

"In support of such capitalization, the commission's report referred inter alia, to the evidence establishing the following facts. The debtor's average net income available for fixed charges as adjusted, for the years 1928 to 1945 (excluding the so-called depression years of 1930 to 1933, inclusive, and the so-called boom years of 1942 to 1945, inclusive) was $312,468. On the basis of studies made by the officers and staff of the trustees and debtors, it was estimated that net earnings of the future normal year would amount to $312,468. Deducting from the anticipated normal year's net earnings of $312,468, $200,000 of interest on new bonds, Federal income taxes at 38% on the remainder, and $25,000 as a sinking fund payment on the new bonds, there would be about $44,730 available for dividends on the new stock in the future normal year, or about 21 cents per share. On the basis of net earnings equal to those of 1936 or 1941, the income available for dividends on the new stock would amount to over $1 per share. Capitalized at 4%, $312,468 produces $7,811,700 and the 1936 and 1941 earnings produce $15,569,850 and $16,055,400 respectively. The commission's bureau of valuation estimates of cost of reproduction less depreciation plus the value of land and rights for the 2 debtors produce a total of $16,515,858.

"The court concludes that it should approve the new capitalization as approved by the commission.

"The commission's plan proposed (in addition to cash distributions hereafter mentioned) the following

divisions of the proposed issues of new bonds and stock as between (a) the $3,199,000 of Fives which were held on the effective date of the plan, January 1, 1945, by persons other than the Canadian Pacific, and (b) the holder of $4,000 of the subsidiary debtor's bonds, and (c) the Canadian Pacific as the then owner of $801,000 of Fives and of all other securities of the debtor and of all other securities of the Mineral Range.

	Bonds	Stocks
"To holders of $3,199,000 of Fives	$1,919,400	.....
"To holders of 4,000 of Mineral Range Bonds....	2,000	.....
"To the Canadian Pacific...	3,078,600	$10,500,000
Total	$5,000,000	$10,500,000"

The effect of this reorganization is shown in Exhibit 12, the comparative balance sheets of the predecessor railroads and the successor railroad for the year ended December 31,, 1949. This exhibit showed on the asset side a reduction of the figures stated for total investments, less recorded depreciation and amortization, from $46,738,970 to $16,037,656. On the liability side, it showed a reduction of capital stock from $22,000,000 to $10,500,000, a reduction of long-term debt from $26,176,972 to $6,761,272, and the wiping off the books of $32,854,673 of interest in default.

The results of the operation of the new company down to December 31, 1951, the last baiance sheet prior to the tax year in dispute, are shown on the railroad's balance sheet of that date. Here the comparable total investment figure, less recorded depreciation and amortization, is shown as increased to $17,198,166. The capital stock is shown at the same figure, $10,500,000, and the total sur-

plus shows an increase of approximately $1,000,000, to $1,693,501.

The corporation and securities commission took these last figures as "the paid-up capital and surplus" for the purpose of its computation of the tax due under section 5b (C. L. S. 1952, §450.305b (Stat. Ann. 1953 Cum. Supp. §21.208(2))).

The appellant railroad offers 3 arguments in this appeal:

1) That the commission and tax appeal board erred in the determination of paid-up capital and surplus as stated above;

2) That net ton miles of *interstate* freight transported by it in Michigan cannot be used to measure that portion of paid-up capital and surplus which is taxable in Michigan, without violation of the commerce clause of the United States Constitution;

3) That on 4 separate grounds P. A. 1952, No. 183, is unconstitutional in the proposed application to appellant railroad, under the Michigan Constitution (1908).

We shall examine these contentions in this order.

As to the first issue raised, the appellant railroad contends that the corporation and securities commission erred in accepting appellant's own book figures as to capital and surplus. It contends that its book figures are controlled by interstate commerce commission accounting methods and by title 49, §20a, of the United States code, and relies upon In re Appeal of Hoskins Manfg. Co., 270 Mich. 592, wherein this Court stated our general rule (pp. 596, 597):

> "As a general proposition, we think the State is justified in holding that the tax is determined from the corporate books. The statute does not provide, in express language or by authorization of expense, for the

impractical procedure of audit and appraisal of each corporation each year by the State. It contemplates that the tax shall be found from the annual report of the corporation to the secretary of State, supplemented by the further facts demanded under Act No. 327, P. A. 1931, §82(o), and the detailed and exact information provided for in 2 C. L. 1929, §10143. Obviously, the source of information and facts is the corporate books, which the statute assumes, and requires, shall be kept correctly. Obviously, also the books represent the action of the corporation in valuing its assets and it has little cause to complain of such book values.

"But, because humans may err, there are exceptions to such rule. The State itself holds the balance sheet final only in the absence of fraud or error. Such exception is reasonable and proper if 'error' is given the broad meaning of 'incorrectness' and works to the protection of the taxpayer as well as the State. The law should be read and administered to secure to the State all sums justly due it, but no more."

It should be noted in passing that the Hoskins rule was applicable only to computation of "surplus" and did not involve any dispute concerning "paid in capital."

The statutory provisions under which paid-in capital and surplus are computed are as follows:

"For the purpose of this act only, each share of no par value shall be deemed to have the value of at least $1, or such value as shall have been fixed by the corporation for the sale of such stock, or the book value as determined by the Michigan corporation and securities commission, whichever may be the higher. In any case where the capital of a corporation is not divided into shares, the whole property thereof shall be

deemed to be the authorized capital stock for the purposes of this act.

"The term 'surplus,' as used in this act, shall be taken and deemed to mean the net value of the corporation's property, less its outstanding indebtedness and paid-up capital; but in no case, either as to domestic or as to foreign corporations, shall any deduction be made from the item of paid-up capital, in computing the franchise fee thereon, by reason of any impairment of the same." C. L. S. 1952, §450.304 (Stat. Ann. 1953 Cum. Supp. §21.205).

The statutory language above, plus the interpretation placed thereon in In re Appeal of Newton Packing Co., 279 Mich. 139, lends weight to appellees' contention that appellant's fair value argument is applicable only to the surplus item. Nonetheless we will discuss the issue as appellant poses it.

Appellant's brief cites the evidence upon which it argues that the commission's finding of paid-up capital and surplus overstated the actual value of its assets:

"As will be remembered, in the course of the reorganization certain creditors of the old railroads desired to receive bonds of the corporation resulting from the reorganization (this petitioner) rather than the shares of its stock to which they would be entitled under the plan. It was agreed between them and the Canadian Pacific Railway Company that the stock to which they would be entitled would be exchanged for some of the bonds to which that railroad company would be entitled. It was, therefore, necessary to fix a true value for the stock and a true value for the bonds. After arm's length negotiations, it was determined that the value of the stock was $7.50 per share and the value of the bonds $70 per $100 of face value.

These values were approved both by the I. C. C. and the court.

"Again, at the hearing petitioner gave evidence that the stocks of railroads comparable to petitioner had a market value about equal to 7.78 times their annual earnings per share. It also showed that the annual earnings of petitioner in 1951 were about $1 per share. On this basis, the value of each share of the no par stock of petitioner was $7.78 per share which is very close to the value assigned to this stock by the I. C. C. at the time of reorganization.

"This means that the actual value of the assets received by petitioner at the time of its incorporation was actually no more than $5,133,800 even allowing a value of $7.78 per share to the stock.

"210,000 shares at $7.78 per share.....	$1,633,800
$5,000,000 of bonds at 70% of face value	3,500,000
	$5,133,800"

The first computation appellant relies on was made prior to the entry of the reorganization order. The opinion upon which that order was based, as we have noted, stated the fair value of the physical assets of the appellant as $16,515,858, and authorized capitalization at $10,500,000.

The record discloses no protests at the hearing in regard to these determinations when they were made by the interstate commerce commission and approved by the Federal district court.

The only other statistic pertaining to appellant's fair value argument is that based on Moody's estimate of a market value for railroad stocks of 7.78 times earnings. Appellant urges that this formula should be accepted to show the total value of the capital stock and that it should be applied to 1951 earnings only.

We note that every share of appellant's stock is owned by the Canadian Pacific Railway Company. We note that none has been sold or offered for sale. We note that the $1 per share earnings, now the subject of appellant's complaints, are substantially the same as earnings anticipated by the Federal district court when it approved the reorganization plan with its proposed capitalization:

> "In support of such capitalization, the commission's report referred inter alia, to the evidence establishing the following facts. The debtor's average net income available for fixed charges as adjusted, for the years 1928 to 1945 (excluding the so-called depression years of 1930 to 1933, inclusive, and the so-called boom years of 1942 to 1945, inclusive) was $312,468. On the basis of studies made by the officers and staff of the trustees and debtors, it was estimated that net earnings of the future normal year would amount to $312,468. Deducting from the anticipated normal year's net earnings of $312,468, $200,000 of interest on new bonds Federal income taxes at 38% on the remainder, and $25,000 as a sinking fund payment on the new bonds, there would be about $44,730 available for dividends on the new stock in the future normal year, or about 21 cents per share. On the basis of net earnings equal to those of 1936 or 1941, the income available for dividends on the new stock would amount to over $1 per share. Capitalized at 4%, $312,468 produces $7,811,700 and the 1936 and 1941 earnings produce $15,569,850 and $16,055,400 respectively. The commission's bureau of valuation estimate of cost of reproduction less depreciation plus the value of land and rights for the 2 debtors produce a total of $16,515,858."

The tax appeal board summarized its holdings as to the disputed computation of appellant's paid-up capital thus:

"In determining the amount of capital of appellant created by the contributions of the shareholders, the appellee commission in this case used the book value of $10,500,000 as returned by the corporation on its 1952 annual report. There is evidence in the record in the proceedings before the interstate commerce commission and the Federal district court from which the commission could have found that the contributions of the shareholders to capital equaled or exceeded this stated figure. The testimony of the witness Weston supports the appellee in this regard. Upon this record there is no evidence from which this appeal board can find that such determination by the appellee commission was erroneous or amounted to an abusive exercise of its discretion. Therefore the appeal board concludes that on this issue the determination of capital made by the corporation and securities commission was proper and it is approved."

As to the dispute about the surplus figure employed by the commission in computing the disputed tax, appellee again points to the fact that it accepted appellant's own figures. Appellant's basic argument on this point follows that just outlined above—namely, that at the time of the reorganization plan the total equity in the new railroad should be measured by 7.78 times $210,000 (at $1 a share earnings), plus 70% of the value of $5,000,000 worth of bonds, or a total of $5,133,800. As a consequence, appellant contends that the surplus of $629,110 reported in its 1949 balance sheet was unrealistic and nonexistent and should be deducted from the surplus of $1,693,501 reported in its 1951 balance sheet.

In the end, appellant's argument pertaining to the computation of its paid-up capital and surplus amounts to the assertion that its own balance sheet figures overstated the

value of its physical assets, including land and buildings and trackage and equipment, by $9,500,000.

Yet, in a supplemental statement dated December 31, 1953, Exhibit 11 in this proceeding, appellant shows its "transportation property" valued at $18,970,629.

This is an appeal in the nature of certiorari from a decision of the Michigan tax appeal board. In such a case we do not disturb the findings of fact of the board when they are supported by competent evidence. Udylite Corporation v. Corporation & Securities Commission, 319 Mich. 1; Chicago, Duluth & Georgian Bay Transit Co. v. Corporation & Securities Commission, 319 Mich. 14.

See, also, Royal v. Ecorse Police & Fire Commission, 345 Mich. 214.

We do not find the "error" or "incorrectness" referred to in the Hoskins Case, *supra*. There was competent evidence to support the determination of appellant's paid-up capital and surplus made by appellee commission.

We now now turn to what is, in our view, the most significant constitutional issue presented by this case. It is appellant's claim that the formula applied by the commission to appellant's paid-up capital and surplus to determine the portion thereof which is allocable to Michigan is offensive to the commerce clause of the United States Constitution.

The formula objected to as set forth in the 1952 amendment as section 5b (C. L. S. 1952, §450.305b (Stat. Ann. 1953 Cum. Supp. §21.208(2))) is as follows:

> "For the purpose of determining the annual franchise fee, the tax payable by a railroad company shall be measured by that portion of its paid-up capital and surplus determined by the average of the following 2 percentage ratios: The net ton miles of freight

handled in this State to the total net ton miles of freight handled within and without the State; the number of miles of all track over which it operates within this State to the total number of miles of all track over which it operates within and without the State."

It is appellant's contention that the appellee commission could not constitutionally employ, in determining "net ton miles of freight handled in this State," any net ton miles of freight which had moved in Michigan in interstate commerce. The practical importance of this argument is shown in the following calculations of the percentage of appellant's paid-up capital and surplus to be allocated to Michigan for the purpose of computation of the franchise tax. The first calculation is that of appellee commission, and the second as proposed by appellant railroad:

"Net ton miles of freight
(interstate and intra state)
532,709,000 (in Michigan)

677,639,000 (total) = 78.61%

"Trackage:
558.37 (in Michigan)

687.85 (total) = 81.18%

2/159.79%

79.895%"

* * * * *

"Net ton miles of freight:
61,031,000 (Michigan intra state)

677,639,000 (total) = 9.000%

"Trackage:
558.37 (in Michigan)

687.85 (total) = 81.18%

2/90.18%

45.09%

The provision of the United States Constitution relied upon by appellant is as follows:

> "The Congress shall have power * * *
>
> "3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." U. S. Const., art. 1, §8.

Few provisions in our Constitution have provided as much ground for debate as to interpretation, or provoked as much litigation. And the supreme court has divided closely and repeatedly from early, down to recent, history upon the general question presented by this case, pertaining to the extent of restraint imposed by these words upon a State's power to tax a business which is engaged in interstate commerce.

It should perhaps be noted at the outset that the words of the commerce clause do not in themselves specifically interdict State taxation of interstate commerce.* The United States supreme court's interpretation of the clause has, however, held constitutionally offensive certain general classifications of State taxes. Among these classifications, the following may be cited as impinging to some degree upon our present problem:

1) Privilege taxes requiring payment of a tax as a simple condition precedent for carrying on exclusively interstate commerce. Ozark Pipe Line Corporation v. Monier, 266 U. S. 555; Puget Sound Stevedoring Co. v. State Tax Commission, 302 U. S. 90; Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602; Railway Express Agency, Inc. v. Virginia, 347 U. S. 359.

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*See Mr. Justice Douglas dissenting in part, Joseph v. Carter & Weeks Stevedoring Co., 330 US 422, 445.

2) Direct taxes upon either interstate commerce or gross receipts from interstate sales—at least where such taxes were not reasonably apportioned. Ratterman v. Western Union Telegraph Co., 127 U. S. 411; Meyer v. Wells, Fargo & Co., 223 U. S. 298; East Ohio Gas Co. v. Tax Commissioner, 283 U. S. 465; Cooney v. Mountain States Telephone & Telegraph Co., 294 U. S. 384; J. D. Adams Manfg. Co. v. Storen, 304 U. S. 307; Freeman v. Hewit, 329 U. S. 249.

See, also, United States Glue Co. v. Town of Oak Creek, 247 U. S. 321.

3) Taxes which it held unreasonably burdensome upon interstate commerce. Western Union Telegraph Co. v. Kansas, 216 U. S. 1; Ingels v. Morf, 300 U. S. 290.

4) Taxes which it held discriminatory in effect as between interstate and intra state commerce. Webber v. Virginia, 103 U. S. 344; Walling v. Michigan, 116 U. S. 446; Memphis Steam Laundry v. Stone, 342 U. S. 389.

On the other hand, the same court has upheld as not offending the commerce clause State taxes in at least the following classifications:

1) Property taxes levied on property located within the taxing State and used for interstate commerce. Western Union Telegraph Co. v. Attorney General, 125 U. S. 530; Adams Express Co. v. Ohio State Auditor, 166 U. S. 185; Baker v. Druesedow, 263 U. S. 137; Ott v. Mississippi Barge Line, 336 U. S. 169.

(2) Taxes levied upon net income of business engaged in interstate commerce where the portion of net income taxed was reasonably apportioned as to the taxing State. United States Glue Co. v. Town of Oak Creek, *supra;* Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113;

Bass, Ratcliff & Gretton, Limited v. State Tax Commission, 266 U. S. 271.

3) Taxes levied directly upon interstate commerce (or gross receipts therefrom) but held reasonably related to occasioning interstate commerce to pay its own way in the taxing State. Postal Telegraph Cable Co. v. Richmond, 249 U. S. 252; Interstate Busses Corporation v. Blodgett, 276 U. S. 245; Western Live Stock v. Bureau of Revenue, 303 U. S. 250, see cases cited p. 254.

See, also, Wisconsin v. J. C. Penney Co., 311 U. S. 435.

4) Privilege or franchise taxes levied upon the right to do intra state business, including where the business concerned was engaged in both inter- and intra state commerce, provided only that the tax or fee was reasonably related to the value of the intra state business done by the taxpayer in the taxing State. St. Louis-San Francisco Railway Co. v. Middlekamp, 256 U. S. 226; Hump Hairpin Manfg. Co. v. Emmerson, 258 U. S. 290; International Shoe Co. v. Shartel, 279 U. S. 429; Ford Motor Co. v. Beauchamp, 308 U. S. 331; International Harvester Co. v. Evatt, 329 U. S. 416; Interstate Oil Pipe Line Co. v. Stone, 337 U. S. 662.

Against this background of instances where the commerce-clause objection to a State tax has been sustained or denied, we consider our instant tax.

The specific facts frequently determine whether or not a State tax as applied to a specific taxpayer is held repugnant to the commerce clause. Five relevant facts distinguish our instant case from the cases relied upon by the appellant:

1) The appellant is a railroad corporation which has most of its trackage and other physical facilities located

in Michigan and hence makes year-round use of the services and protection of this State;

2) The appellant's business is principally interstate commerce, but it also engages in substantial intra state commerce in Michigan;

3) As to the commerce-clause argument advanced by appellant, no claim is advanced that the $38,969 tax is unreasonable and this record amply supports a contrary finding of fact of the Michigan corporation tax appeal board;

4) The tax is levied upon all business organized for profit and doing business within the State of Michigan and is plainly nondiscriminatory as to this taxpayer;*

5) The tax is not levied upon any part of the interstate commerce of the appellant or any direct product thereof, but upon appellant's privilege of doing business within Michigan.

This last point bears elucidation since it is crucial to our decision herein.

The tax complained of has been interpreted by this Court as a franchise tax imposed upon the right to do intra state business—with that privilege measured by the amount of paid-up capital and surplus reasonably allocable to Michigan.

> "We are impressed that in the discussion of this matter counsel lose sight of the nature of the privilege fee sought to be collected. It is not a tax upon the proceeds of the business of the corporation. It in no way involves the tolls collected from those using the bridge as a means of transportation between Detroit and Canada. It is a fee imposed by law 'for the privilege of

*See last portion of this opinion.

exercising its franchise and of transacting its business within this State.' The distinction between such a fee and a tax upon property was clearly pointed out in *Union Steam Pump Sales Co. v. Secretary of State*, 216 Mich. 261, and later in *Re Truscon Steel Co.*, 246 Mich. 174, and in *Re G. H. Hammond Co.*, 246 Mich. 179. The question presented is so clearly disposed of in *Re Detroit & Windsor Ferry Co.*, 232 Mich. 574, that further discussion seems unnecessary." *In re Detroit International Bridge Co.*, 257 Mich. 52, 59.

See, also Holland Hitch Co. v. State of Michigan, 318 Mich. 474.

Mr. Justice Smith, in a recent decision of this Court interpreting the same tax (albeit a different allocation formula), held:

"We are taxing the privilege of carrying on intrastate activities. * * * We are taxing the value of the exercise of a privilege in this State and we ascertain that value through the application of property, payroll, and sales factors to the fair average stock value or the paidup capital and surplus." Cleveland-Cliffs Iron Co. v. Corporation & Securities Commission, 351 Mich. 652, 682.

Over and above the legislative statement of the purpose of the tax set forth in C. L. S. 1952, §450.304 (Stat. Ann. 1953 Cum. Supp. §21.205), and the interpretation thereof by this Court just cited, the intra state character of the tax is best portrayed by section 5e of the statute:

"If it shall appear on the application of the taxpayer or otherwise that an allocation factor determined pursuant to this act does not properly reflect the activity, business, receipts and capital of a tax-

payer reasonably attributable to the State, the commission shall adjust it by:

"(1) Excluding 1 or more of the factors or any component thereof;

"(2) Including 1 or more other factors, such as expenses, purchases, contract values (minus subcontract values);

"(3) Excluding proportionately 1 or more asset items in computing entire paid-up capital and surplus; or

"(4) *Apply any other similar method calculated to effect a fair and proper allocation according to the receipts, activity, business and capital reasonably attributable to this State.*" (Emphasis supplied.) C. L. S. 1956, §450.350e (Stat. Ann. 1957 Cum. Supp. §21.208 (5)).

Under all of these facts, Michigan's right to levy the tax here contested would be supported by many of the previous holdings of the United States supreme court to which we have already referred.

The cardinal question, however, which appellant submits pertains to the allocation formula and the use therein of a factor of interstate commerce. As stated by appellant, the crucial question is:

"Can the net ton miles of freight transported in interstate and foreign commerce by petitioner and appellant (a railroad) in the State of Michigan be considered and used together with other factors for the purpose of measuring the portion of such railroad's capital and surplus that is taxable by the State of Michigan for purposes of the annual franchise tax?"

The question is not a new one and it has been answered many times before.

In Maine v. Grand Trunk Railway Co., 142 U. S. 217, a State excise tax for the privilege of doing business in Maine was levied upon all gross receipts of the railroad, apportioned according to the number of miles operated in Maine. The tax was held not offensive to the commerce clause although, obviously, there was an interstate commerce factor in the tax formula. The case has been cited and approved many times since. See Interstate Oil Pipe Line Co. v. Stone, *supra,* 666; Central Greyhound Lines, Inc. v. Mealey, 334 U. S. 653, 658, 663.

In the Interstate Oil Pipe Line Case, Mr. Justice Rutledge, speaking for the majority of the court, said (666, 667):

> "The statute is not invalidated by the commerce clause of the Federal Constitution merely because, unlike the statute attacked in *Memphis Gas Co. v. Stone, supra,* (335 U. S. 80), it imposed a 'direct' tax on the 'privilege' of engaging in interstate commerce. Any notions to the contrary should not have survived *Maine v. Grand Trunk R. Co.,* 142 U. S. 217, which flatly rules the case at bar. That case sustained a State statute which imposed upon an interstate railroad corporation 'an annual excise tax (measured by apportioned gross receipts), for the privilege of exercising its franchises in this State.' The Grand Trunk decision has been approved by this court as recently as the other controlling case of *Central Greyhound Lines v. Mealey, supra* (334 U. S. 653) at 658, 663, in which the court permitted New York to impose a tax on the gross receipts from the operation of an interstate bus

line, provided that tax was apportioned according to mileage traveled within the State. The Mealey Case is not distinguished by saying that it involved only a tax on gross receipts and not a tax on interstate commerce itself, for gross receipts taxes have long been regarded as 'direct' in cases which are supposed to support the proposition that 'direct' taxes on interstate commerce are invalid under the commerce clause."

In International Harvester Co. v. Evatt, *supra*, the United States supreme court considered an Ohio privilege tax described as follows (419):

"The tax is computed under the Ohio statute in the following manner: Section 5498 prescribes the formula used in determining what part of a taxpayer's total capital stock represents business and property conducted and located in Ohio. To determine this, the total value of issued capital stock is divided in half. One half is then multiplied by a fraction, the numerator of which is the value of all the taxpayer's Ohio property, and the denominator of which is the total value of all its property wherever owned. The other half is multiplied by another fraction whose numerator is the total value of the 'business done' in the State and whose denominator is country-wide business. Addition of these 2 products gives the tax base, which, when multiplied by the tax rate of 1/10 of 1%, produces the amount of the franchise tax.

"In the 'business done' numerator, the State included as a part of Ohio business an amount equal to the sales proceeds of a large part of the goods manufactured at appellant's Ohio plants, no matter where the goods had been sold or delivered."

And Mr. Justice Black, for a unanimous court, said as follows (421):

> "Of course, the commerce clause does not bar a State from imposing a tax based on the value of the privilege to do an intrastate business merely because it also does an interstate business. Ford Motor Co. v. Beauchamp, 308 U. S. 31, 336. *Nor does the fact that a computation such as that under Ohio's law includes receipts from interstate sales affect the validity of a fair apportionment.* See e.g., *Hump Hairpin Co. v. Emmerson,* 258 U. S. 290; *Underwood Typewriter Co. v. Chamberlain,* 254 U. S. 113; *American Mfg. Co. v. St. Louis, supra* (250 U. S. 459); *International Shoe Co. v. Shartel,* 279 U. S. 429, 433; *Western Cartridge Co. v. Emmerson,* 281 U. S. 511. And here, it clearly appears from the background of Ohio's tax legislation that the whole purpose of the State formula was to arrive, without undue complication, at a fair conclusion as to what was the value of the intrastate business for which its franchise was granted." (Emphasis supplied.)

See, also, the discussion of the commerce-clause problem in Mr. Justice Smith's opinion in Cleveland-Cliffs, *supra,* 690 ff, particularly the footnote p. 695.

In a recent well-considered decision upholding a Massachusetts excise tax wherein the allocation formula likewise contained interstate factors, the Massachusetts supreme court said:

> "These decisions of the supreme court of the United States, as we understand them, sustain the constitutionality under the commerce clause of a State excise (like that in the present case) on a domestic corpora-

> tion for possessing or exercising its corporate privileges, if measured by net income, apportioned, as in the present case, in a practical way (which need not by any means be precise) to give a reasonable and rough approximation of values attributable to the taxing State granting the privileges. The fact that net income from interstate transactions (and the value given to intra state privileges by them) may be taken into account reasonably in the tax computations is immaterial." State Tax Commission v. John H. Breck, Inc., 144 N. E. 2d 87, 101.

We recognize, of course, that the precise formula with which we deal in the instant case is somewhat different from the formulae in cases just cited. But we are unable to find any distinction in the constitutional principles applicable.

We construe the formula in section 5b as having as its purpose the ascertaining of a fair proportion of appellant's paid-up capital and surplus allocable to Michigan for purpose of taxing appellant's right to carry on its intra state business.

Appellant relies heavily upon the Michigan cases of Gartland Steamship Co. v. Corporation & Securities Commission, 339 Mich. 661, and Panhandle Eastern Pipe Line Co. v. Corporation & Securities Commission, 346 Mich. 50.*

Both of these cases may be distinguished from our instant case on their facts. Gartland had no property in Michigan and did what the Court apparently regarded as only an inconsequential intra state business in Michigan.

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*See interesting critique on these cases, Phillips, The Allocation Formula Under the Michigan Annual Franchise Tax Taxes, March—1957, 162.

Over 90% of Panhandle's pipe line, properties and activities were located outside of Michigan. In addition, Panhandle involved the continuous flow of gas from the wellheads in the Southwest to Michigan customers. See Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157. Neither case involved the identical formula objected to here. And both cases, this Court, while rejecting the specific formula, upheld the right to levy the tax and ordered recomputation under section 5e to achieve a reasonable result.

It is obvious that what the State offered in service and protection to the Gartland and Panhandle taxpayers in return for the tax was substantially different (particularly in the Gartland Case) from the fact situation considered herein. This distinction has been cited as a decisive one:

> "The Constitution is not a formulary. It does not demand of States strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A State is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the State has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." Wisconsin v. J. C. Penney Co., *supra*, 444.

Both Gartland and Panhandle opinions, however, relied upon Cooney v. Mountain States, *supra*, for constitutional authority. Both failed to distinguish between the direct taxation of interstate commerce (which Cooney ruled out) and the employment of an interstate-commerce factor in the formula for determining the amount of paid-up capital

and surplus to be allocated to Michigan in computing the fee to be assessed for doing intrastate business in Michigan.

We find no United States supreme court precedent which interprets the commerce clause as forbidding use of such an allocation formula unless the result is shown to be unreasonable or discriminatory.

We now limit the application of the opinions in Gartland and Panhandle and hold that there is no constitutional barrier* to the use of an interstate-commerce factor in the allocation formula for determining the portion of paid-up capital and surplus allocable to Michigan for computation of a franchise tax for the right to carry on intra state business in Michigan where, as here, there is no showing that such formula reaches an unreasonable or discriminatory result.

As to the third group of issues wherein appellant argues that this tax violates 4 separate provisions of the State Constitution, we can be more concise.

The essence of appellant's contention is that the instant franchise tax is in fact a tax upon the same subject of taxation as is taxed by a much older statute, P. A. 1905, No. 282 (C. L. 1948 and C. L. S. 1954, §207.1 et seq. (Stat. Ann. 1950 Rev. and 1953 Cum. Supp. §7.251 et seq.)).

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*It should be noted that no Federal due process question is presented to us in this case presumably because the interstate-commerce factor complained of was a part of "the net ton miles of freight handled in this State." CLS 1952, §450.305b (Stat Ann 1953 Cum Supp §21.208(2)). As to the effect of the due process clause upon inclusion of an out-of-State factor in the formula for measuring the value of the right to do intrastate business, see the excellent analysis in Mr. Justice Smith's opinion in Cleveland-Cliffs Iron Co. v. Corporation & Securities Commission, 351 Mich 652.

Examination of this earlier statute indicates beyond question that it is in no sense a tax upon the right to do business. On the contrary, it is plainly an ad valorem tax upon the value of the property of railroad and certain other transportation and communication companies, levied in lieu of local property taxes.

The title to the act begins, "An act to provide for the assessment *of the property* • • • of railroad companies." (Emphasis supplied.)

Section 5 provides:

> "The term property, as used in this act, shall be deemed to include all property, real or personal, belonging to • • • corporations • • • subject to taxation under this act."

There follows a list of real and personal properties, concluding:

> "and all other real and personal property, and all franchises, said franchises not to be directly assessed, but to be taken into consideration in determining the value of the other property." C. L. 1948, §207.5 (Stat. Ann. 1950 Rev. §7.255).

It is this last language upon which appellant bases his State constitutional arguments.

We believe the statutory language itself provides the answer. It recites, as if in anticipation of this argument, "said franchises not to be directly assessed, but to be taken into consideration in determining the value of the other property."

The statute in question makes crystal clear its ad valorem nature when it provides for the tax as to these tax-

payers to be in lieu of all taxes for State and local purposes (C. L. 1948, §207.14 (Stat. Ann. 1950 Rev. §7.264)), and further provides for the State board to certify they have estimated and assessed the same at what they

> "believe to be the true cash value thereof, and * * * have assessed the taxes thereon at the average rate of taxes for State, county, township, school, municipal and other purposes levied through this State during the preceding year as determined by us."

This subject of taxation argument has been dealt with and settled by this Court in Western Electric Co. v. Department of Revenue, 312 Mich. 582, which required construction and application of article 10, §1, Michigan Constitution (1908), which appellant in this case asserts as a bar to the instant tax because by its terms it is payable to the general funds:

> "All subjects of taxation now contributing to the primary school interest fund under present laws shall continue to contribute to that fund."

Under the constitutional interpretation given by this Court, the words "all subjects of taxation" do not refer to particular taxpayers. This Court has held the phrase "connotes a deeper significance, the underlying principle on which the tax is designed and imposed." Western Electric Co. v. Department of Revenue, *supra,* 589.

In our case, the subject of taxation then contributing to the primary school interest fund was set forth as far as appellant is concerned in P. A. 1905, No. 282. This tax has been construed, and in our opinion can only be construed, as providing "for the taxing of the property of certain corporations on an ad valorem basis." Western Electric Co. v. Department of Revenue, supra, 593.

On the other hand, the instant tax has, as we have seen, been construed repeatedly as a tax imposed upon the right to do business within the State. Union Steam Pump Sales Co. v. Secretary of State, *supra;* In re Detroit International Bridge Co., *supra,* aff'd Detroit International Bridge Co. v. Corporation Tax Appeal Board of Michigan, 287 U. S. 295; Cleveland-Cliffs Iron Co. v. Corporation & Securities Commission, *supra.*

The franchise tax imposed upon appellant is not upon the same subject of taxation as the ad valorem tax on property imposed by P. A. 1905, No. 282, and hence article 10, §1, of the Constitution (1908) is not applicable.

For similar reasons, we hold inapplicable appellant's argument that the franchise tax constitutes double taxation or violates the uniformity provisions of article 10, §§3 and 4, when applied to appellant in conjunction with P. A. 1905, No. 282. The 2 taxes are not upon the same subject or for the same purpose. C. F. Smith v. Fitzgerald, 270 Mich. 659.

See, also, 1 Cooley on Taxation (4th ed.), §223.

Nor does the franchise tax discriminate against railroads or offend the due process clause of the Michigan Constitution, art. 2, §16. Appellant's right to do business within Michigan is taxed only once as is that of every other profit corporation doing business within this State. Union Steam Pump Sales Co. v. Secretary of State, supra.

Affirmed. No costs, public questions being involved.

Talbot Smith,
Eugene F. Black,
John D. Voelker,
Concurred with Edwards, J.

STATE OF MICHIGAN—IN THE SUPREME COURT

Duluth, South Shore & Atlantic Railroad Company, a Minnesota corporation,
Petitioner and Appellant,
v.
Michigan Corporation & Securities Commission and Michigan Corporation Tax Appeal Board,
Defendants and Appellees.

Before the Entire Bench, Except Kavanagh, J.

Kelly, J.

The 1952 legislature amended the general corporation fee act (P. A. 1921, No. 85) by adding section 5b and, for the first time, imposed an annual franchise tax on railroad corporations, as follows:

> "Sec. 5b. For the purpose of determining the annual franchise fee, the tax payable by a railroad company shall be measured by that portion of its paid-up capital and surplus determined by the average of the following 2 percentage ratios: The net ton miles of freight handled in this state to the total net ton miles of freight handled within and without the state; the number of miles of all track over which it operates within the state to the total number of miles of all track over which it operates within and without the state * * *."

Section 5b has since been amended, but this formula prevailed in 1952 and is involved in this appeal.

My Brother cites over 30 United States supreme court decisions, but section 5b is unique not only because it was the first effort by the Michigan legislature to impose an annual special franchise tax on railroads but, also, because the legislature created a formula different than the numerous formulas adopted by legislatures of other States and passed upon by the United States supreme court.

The main question is whether the formula applied by the commission to appellant's paid-up capital and surplus to determine the portion thereof allocable to Michigan is offensive to the commerce clause of the United States Constitution. Justice Edwards decides it is not, and I conclude that it is offensive.

In determining the tax, the commission and the appeal board found as factor number 1 that the net ton miles of freight in Michigan (interstate and intra state) was 532,709,000, which would constitute 78.61% of appellant's total 677,639,000 net ton miles of freight carried by petitioner in 1951. The commission then decided as factor number 2 that there was in Michigan 558.37 miles of trackage out of the total of 637.85 miles of appellant's trackage, which would make Michigan trackage 81.18% of the total trackage. From these 2 factors, the commission arrived at the conclusion that 79.8943% of appellant's paid-up capital and surplus was allocable to Michigan for the purpose of the 1952 franchise tax.

Appellant contends that:

> "Under the decisions of this Court and of the supreme court of the United States, the commission and the board should have omitted all consideration of the 'net ton miles of freight' transported by petitioner from points within Michigan to points outside of it, from points outside of Michigan to points within it,

and between points both of which were outside of it; and the calculation of the portion of petitioner's paid-up capital and surplus allocable to Michigan should have been made as follows:

"Net ton miles of freight:

$$\frac{61{,}031{,}000 \text{ (Michigan intra state)}}{677{,}639{,}000 \text{ (total)}} = 9.00\%$$

"Trackage:

$$\frac{558.37 \text{ (in Michigan)}}{687.85 \text{ (total)}} = 81.18\%$$

$$\frac{81.18\% + 9.00\%}{2} = \frac{90.18\%}{2} = 45.09\%$$

"Properly only 45.09% of the paid-up capital and surplus of petitioner is allocable to Michigan for the purposes of this tax. The commission and the appeal board have allocated 79.895% thereof to this State. • • •

"The error in the interpretation and application of the allocation formula alone caused the assessment of a tax excessive in the amount of $16,975.44."

The tax in question is a franchise tax based in part on ton miles of freight transported in interstate commerce.

A State cannot levy a franchise tax on the privilege of engaging in interstate commerce within its border.

Cooney v. Mountain States Telephone & Telegraph Co., 294 U. S. 384, dealt with the State of Montana's right to levy an occupation tax on a telephone company. The supreme court stated:

> "There is no question that the State may require payment of an occupation tax from one engaged in both intrastate and interstate commerce. But a State cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. * * * Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intra state business without also withdrawing from the interstate business."

In deciding East Ohio Gas Co. v. Tax Commission of Ohio, 283 U. S. 465, the supreme court left no doubt that a State cannot increase its tax on interstate commerce by any device calling for the inclusion of ton miles of interstate freight and, further, that transactions which are an essential and integral part of interstate commerce cannot be considered. The court expressed its views as follows:

> "It is elementary that a State can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom. * * * And, while a State may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction in order to be valid must be imposed solely on account of the intrastate business without enhancement because of the interstate business done, and it must appear that one engaged exclusively in interstate business would not be subject to the imposition

and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business."

In Gartland Steamship Co. v. Corporation & Securities Commission, 339 Mich. 661, the Court followed the United States supreme court's rulings as set forth above and ordered the commission to recompute the franchise fee "excluding any and all cargoes transported in interstate and foreign commerce."

In Panhandle Eastern Pipe Line Co. v. Corporation & Securities Commission, 346 Mich. 50, we dealt with a legislative created franchise fee formula (section 5 of the corporation fee act (C. L. S. 1952, §450.305; Stat. Ann. 1953 Cum. Supp. §21.208)) which provided that the ratio of corporate Michigan property to total corporate property; plus a ratio of Michigan wages to total wages; plus one-half of the receipts from Michigan interstate sales to all sales, should determine the tax. We held that the formula could not include the one-half of the sale of gas in interstate commerce.

Justice Edwards endeavors to reconcile his opinion with our previous opinions, as follows:

"Appellant relies heavily upon the Michigan cases of Gartland Steamship Co. v. Corporation & Securities Commission, 339 Mich. 661, and Panhandle Eastern Pipe Line Co. v. Corporation & Securities Commission, 346 Mich. 50.

"Both of these cases may be distinguished from our instant case on their facts. Gartland had no property in Michigan and did what the Court apparently regarded as only an inconsequential intrastate business in Michigan. Over 90% of Panhandle's pipe line, prop-

erties and activities were located outside of Michigan. In addition, Panhandle involved the continuous flow of gas from the wellheads in the Southwest to Michigan customers. See Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157. Neither case involved the identical formula objected to here. And in both cases, this Court, while rejecting the specific formula, upheld the right to levy the tax and ordered recomputation under section 5e to achieve a reasonable result."

I do not agree with such a reconciliation. The fact remains that it is not the ownership of property within this State that is in issue, but the attempt to use the ton miles of freight transported in interstate commerce.

I agree with my Brother's conclusion that the commission did not err in its determination of the value of paid-up capital and surplus.

Reversed, with order that the commission recompute tax excluding ton miles of freight transportation in interstate commerce.

John R. Dethmers,
Leland W. Carr,
Concurred with Kelly, J.

JUDGMENT OF SUPREME COURT OF MICHIGAN

At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the tenth day of September in the year of our Lord one thousand nine hundred and fifty-eight.

Present the Honorable John R. Dethmers, Chief Justice, Leland W. Carr, Harry F. Kelly, Talbot Smith, Eugene F. Black, George Edwards, John D. Voelker, Associate Justices.

Duluth, South Shore & Atlantic Railroad Co., Plaintiff and Appellant, v. Michigan Public Service Commission, et al., Defendants.	47303

This matter having been brought to this Court by appeal from an order of the Michigan Corporation and Securities Commission, and having been argued by counsel, and due consideration having been had by the Court, and it appearing to the Court that in the making of said order in said Commission there is No Error, Therefore it is ordered and adjudged that the order of said Michigan Corporation and Securities Commission appealed from, be and the same is hereby affirmed.

It is further ordered that no costs be awarded herein.

ORDER OF SUPREME COURT OF MICHIGAN DENYING MOTION FOR REHEARING

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room in the Capitol, in the City of Lansing, on the thirteenth day of October in the year of our Lord one thousand nine hundred and fifty-eight.

Present the Honorable John R. Dethmers, Chief Justice, George Edwards, John D. Voelker, Harry F. Kelly, Leland W. Carr, Eugene F. Black, Talbot Smith, Thomas M. Kavanagh, Associate Justices.

Duluth, South Shore & Atlantic Railroad Co.,
v.
Public Service Commission.
No. 47303

A motion for rehearing having been heretofore submitted herein, it is hereby denied.

NOTICE OF APPEAL AND PROOF OF SERVICE

STATE OF MICHIGAN—IN THE SUPREME COURT

Duluth, South Shore & Atlantic Railroad Company, a Minnesota corporation, Petitioner-Appellant, v. Michigan Corporation & Securities Commission and Michigan Corporation Tax Appeal Board, Defendants-Appellees.	No. 47,303

NOTICE OF APPEAL

I. Notice is hereby given that Duluth, South Shore & Atlantic Railroad Company, a Minnesota corporation, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of this Honorable Court. The Supreme Court of the State of Michigan, entered on October 13, 1958, whereby this court refused to reconsider and rehear the above entitled cause in which it had entered a judgment against this petitioner-appellant on September 10, 1958. In said cause petitioner-appellant appeals from an order of appellee, Michigan Corporation Tax Appeal Board, refusing to modify the determination by appellee, Michigan Corporation & Securities Commission, of the annual franchise tax of appellant for the year 1952.

This appeal is taken pursuant to 28 U. S. C. A. Section 1257(2) and 28 U. S. C. A. Section 2103.

II. The Clerk of the Supreme Court of the State of Michigan will please prepare a transcript of the record in

this cause for transmission to the Supreme Court of the United States and include in said transcript the following:

(1) Petition for leave to appeal to the Supreme Court of the State of Michigan;

(2) Order granting leave to appeal;

(3) Record on Appeal in this cause consisting of the Joint Appendix (omitting Exhibit 2 attached to such joint Appendix);

(4) Opinion of the Supreme Court of Michigan in this case;

(5) Judgment of the Supreme Court of Michigan in this case;

(6) Petition by appellant for rehearing;

(7) Order denying petition for rehearing.

III. The following questions are presented by this appeal:

1. Did the Supreme Court of the State of Michigan err in holding that the formula provided in Section 5(b), which was added to Act 85 of the Public Acts of Michigan for 1921 by Act 183 of the Public Acts of Michigan for 1952, did not place an unconstitutional restraint and burden on interstate commerce conducted by Duluth, South Shore & Atlantic Railroad Company in Michigan and other states, in violation of the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, and was therefore unconstitutional?

2. Did the Supreme Court of the State of Michigan err in holding that Section 5(b), which was added to Act 85 of the Public Acts of 1921 by Act 183 of the Public Acts of 1952, had not been applied by the defendants to petitioner-

appellant in a manner repugnant to Article I, Section 8, Clause 3, of the Constitution of the United States since the manner of such application imposed a burden and restraint on interstate commerce conducted by petitioner-appellant in Michigan and other states forbidden by such clause of the Constitution of the United States, and such statute was, therefore, applied in an unconstitutional manner?

Henry I. Armstrong, Jr.,
Attorney for Duluth, South Shore & Atlantic Railroad Company, Appellant.
1400 Buhl Building,
Detroit 26, Michigan.

Bodman, Longley, Bogle, Armstrong & Dahling,
Of Counsel,
1400 Buhl Building,
Detroit 26, Michigan.

Filed December 30, 1958.

PROOF OF SERVICE

State of Michigan,
County of Wayne—ss.

I, George D. Miller, Jr., an attorney in the office of Messrs. Bodman, Longley, Bogle, Armstrong & Dahling, attorneys of record for Duluth, South Shore & Atlantic Railroad Company, a Minnesota corporation, petitioner-appellant herein, depose and say that on the 30th day of December, 1958, I served a copy of the foregoing Notice of

Appeal to the Supreme Court of the United States on Michigan Corporation Tax Appeal Board by delivering a copy of the same to Kay Robinson, the Receptionist in the office of the Auditor General of the State of Michigan, said Auditor General being the Secretary of said Michigan Corporation Tax Appeal Board and that on the same date I also served a copy of the foregoing Notice of Appeal on Michigan Corporation and Securities Commission by delivering the same to Lawrence Gubow, Commissioner.

/s/ George D. Miller, Jr.

Subscribed and sworn to before me this 30th day of December, A. D. 1958.

/s/ Vernita Easton,
Notary Public, Ingham County, Michigan.
My commission expires April 8, 1961.

PROOF OF SERVICE

State of Michigan,
County of Ingham—ss.

I, George D. Miller, Jr., an attorney in the office of Messrs. Bodman, Longley, Bogle, Armstrong & Dahling, attorneys of record for Duluth, South Shore & Atlantic Railroad Company, a Minnesota corporation, petitioner appellant herein, depose and say that on the 30th day of December, 1958, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Michigan Corporation Tax Appeal Board and Michigan Corporation and Securities Commission, defendants-appellees, by delivering the same to Dorothy Hendershott, a Receptionist in the office of the Attorney General of the

State of Michigan, counsel of record for the said Michigan Corporation Tax Appeal Board and Michigan Corporation and Securities Commission, in the Michigan State Capitol Building in Lansing, Michigan, and also by delivering a copy of said Notice of Appeal to T. Carl Holbrook Assistant Attorney General of the State of Michigan.

/s/ George D. Miller, Jr.

Subscribed and sworn to before me this 30th day of December, A. D., 1958.

/s/ Vernita Easton,
Notary Public, Ingham County, Michigan.
My commission expires April 8, 1961.

MICHIGAN STATUTES INVOLVED

NOTE

"*M. S. A.*" = Michigan Statutes Annotated
Callaghan & Co.
"*C. L. '48, Sup. 1954*" = Mason's 1954 Supplement to the Compiled Laws of Michigan for 1948
Mason Publishing Co.

M. S. A. §21.205 Cumulative Supplement
(C. L. '48, Sup. 1954 §450.304)

§21.205. *Annual privilege fee; cooperative association and profit corporation, exceptions, intent; information; value of no par value stock; surplus defined.)* Sec. 4. Every cooperative association and every profit corporation organized or doing business under the laws of this state, or having the privilege to do business, employing capital or persons, owning or managing property or maintaining an office, or engag-

ing in any transaction, in this state, excepting domestic and foreign insurance companies, (domestic and foreign building and loan and savings and loan associations,) medical care corporations, hospital service corporations, state and national banking corporations, trust companies, and such corporations now in existence or hereinafter incorporated formed with the consent of the banking commissioner for the state of Michigan for the purpose of taking over all or a part of the assets of closed banks or trust companies with the intent and purpose of liquidating such assets when and as conditions warrant such action by said corporations, shall pay, at the time of filing the annual report with the Michigan corporation and securities commission, as required by sections 81 and 82 of Act No. 327 of the Public Acts of 1931, being sections 450.81 and 450.82 of the Compiled Laws of 1948, an annual fee of 4 mills upon each dollar of its paid-up capital and surplus, but such franchise fee shall in no case be less than $10.00: Provided, That operating railroad, interurban railroad, telephone, telegraph and express companies heretofore exempt from this franchise tax shall be exempt as to the franchise tax payable in 1953 and thereafter unless the state board of assessors has certified prior thereto to the Michigan corporation and securities commission that the specific tax rate under Act No. 282 of the Public Acts of 1905, as amended, being sections 207.01 to 207.21, inclusive, of the Compiled Laws of 1948, has been based upon state equalized valuation. It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, having the privilege of exercising corporate franchises within this state irrespective of whether any such corporation chooses to

actually exercise such privilege during any taxable period. The Michigan corporation and securities commission shall in all such cases be authorized to require the corporation to furnish detailed and exact information touching such several matters before making a final determination of the privilege fee to be paid by such corporation. For the purpose of this act only, each share of no par value shall be deemed to have the value of at least $1.00, or such value as shall have been fixed by the corporation for the sale of such stock, or the book value as determined by the Michigan corporation and securities commission, whichever may be the higher. In any case where the capital of a corporation is not divided into shares, the whole property thereof shall be deemed to be the authorized capital stock for the purposes of this act.

The term "surplus," as used in this act, shall be taken and deemed to mean the net value of the corporation's property, less its outstanding indebtedness and paid-up capital; but in no case, either as to domestic or as to foreign corporations, shall any deduction be made from the item of paid-up capital, in computing the franchise fee thereon, by reason of any impairment of the same.

M. S. A. §21.208 Cumulative Supplement (in part) (C. L. '48, Sup. 1954 §450.305 (in part))

§21.208 *Annual franchise fee, computation.)* Sec. 5. In the case of computing the annual franchise fee prescribed by section 4 of this act, both as to domestic and foreign corporations, such computations shall be made by the Michigan corporation and securities commission, working in conjunction with the state department of revenue, upon the entire paid-up capital and

surplus of any corporation which does not maintain a regular place of business outside this state other than a statutory office. With respect to any other corporation, except for corporations engaged in business as carriers by air, railroad, highway or water, or finance-business, which are separately treated in sections 5a, 5b, 5c and 5d of this act, said annual franchise fee shall be determined by the Michigan corporation and securities commission, working in conjunction with the state department of revenue, and shall be measured by that proportion of its paid-up capital and surplus which proportion shall be obtained by applying the average of the following 3 percentages, separately computed;

• • • • •

Act 183, Public & Local Acts of Michigan 1952, Sec. 5b.

For the purpose of determining the annual franchise fee, the tax payable by a railroad company shall be measured by that portion of its paid-up capital and surplus determined by the average of the following 2 percentage ratios: The net ton miles of freight handled in this state to the total net ton miles of freight handled within and without the state; the number of miles of all track over which it operates within this state to the total number of miles of all track over which it operates within and without the state: Provided: That in computing the tax of a non-operating railroad there shall be excluded that portion of its paid-up capital and surplus as the ratio of the value of its property leased to an operating railroad bears to the total value of its assets.

M. S. A. §21.210 Cumulative Supplement
C. L. '48, Supp. 1954 §450.309

Note. Reference to Section 5(b) is omitted from the third line of the M. S. A. Cumulative Supplement but it is included in the Public Acts of Michigan for 1954 at page 366.

§21.210. *Remission of amount in excess of proper franchise fee or further liability with respect thereto; notice to corporation, disposition of excess; redetermination of fee, appeal.)* Sec. 9. Every corporation subject to the provisions of this act shall be notified as soon as practicable of the computation of its franchise fee made pursuant to sections 5, 5a, 5b, 5c and 5d of this act in the event it has remitted an amount in excess of the proper fee or has any further liability with respect thereto. If the corporation shall have remitted an amount in excess of its fee as properly computed pursuant to said sections 5, 5a, 5b, 5c and 5d any such excess shall be ref..nded, or, at the option of the corporation, shall be credited to the account of the corporation for application to any franchise fee liability such corporation may incur thereafter. Any such corporation may apply for a redetermination of its franchise fee by filing a written request therefor with the corporation and securities commission within 20 days after receipt of notice of the original computation above referred to. The commission shall give prompt consideration to such request and the grounds of complaint therein set out and shall promptly redetermine the liability of such corporation.

Any corporation conceiving itself to be aggrieved by any such redetermination may appeal within 20 days after notification thereof to an appeal board composed

of the attorney general as its chairman, the state treasurer, and the auditor general as its secretary. The appeal board shall recompute the liability of the taxpayer and shall notify the taxpayer and the commission promptly on its decision.

The commission and/or the corporation may, within 30 days after notification of such decision, and not after, appeal from the decision of the appeal board to the supreme court of the state.

The appeal board shall prescribe reasonable rules and regulations for the conduct of its proceedings.

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 13 1959
JAMES R. BROWNING, Clerk

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1958

No. 712

DULUTH SOUTH SHORE & ATLANTIC RAILROAD COMPANY,
a Minnesota corporation,
Petitioner-Appellant,

vs.

MICHIGAN CORPORATION & SECURITIES COMMISSION and
MICHIGAN CORPORATION TAX APPEAL BOARD,
Defendants-Appellees.

On Appeal from the Supreme Court of the State of Michigan

MOTION TO DISMISS

Paul L. Adams
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SPEAKER-HINES AND THOMAS, INC., LANSING, MICH.—1959

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1958

No. 712

DULUTH, SOUTH SHORE & ATLANTIC RAILROAD COMPANY,
a Minnesota corporation,
Petitioner-Appellant,

vs.

MICHIGAN CORPORATION & SECURITIES COMMISSION and
MICHIGAN CORPORATION TAX APPEAL BOARD,
Defendants-Appellees.

On Appeal from the Supreme Court of the State of Michigan

MOTION TO DISMISS[*]

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal of appellant from the judgment of the Supreme

[*]
Numbers in parentheses will refer to pages of the Jurisdictional Statement, unless otherwise indicated.

Court of Michigan, entered September 10, 1958, be dismissed on the grounds that (1) the question presented is so unsubstantial as to warrant no further argument, (2) the appellant has not properly raised any federal question, and (3) the judgment of the Supreme Court of Michigan is conclusive.

OPINIONS BELOW

Citations to the opinions below are correctly set forth in the Jurisdictional Statement (1-2). The question appellant seeks to have reviewed is considered on pp 652-665 of Volume 353 of the Official Michigan Reports, and is reproduced in the Jurisdictional Statement on pp 56a-69a. The applicable portion of the opinion of the Corporation Tax Appeal Board, affirmed, is reproduced on pp 36a-41a of the Jurisdictional Statement.

JURISDICTION

Appellant attempts to invoke jurisdiction of this Court under 28 U.S.C.A. § 1257(2). For the reasons set forth herein the appeal should be dismissed.

STATUTES INVOLVED

The pertinent provisions of the Michigan statutes in point are set forth in the Jurisdictional Statement on pp 85a-88a.

QUESTIONS PRESENTED

If any federal question has been properly raised and presented, the Jurisdictional Statement does not accu-

rately state such question. We restate what appellees believe to be the only possible federal question raised:

> "Can the net ton miles of freight transported in interstate and foreign commerce by petitioner and appellant (a railroad) in the State of Michigan be considered and used together with other factors for the purpose of measuring the portion of such railroad's capital and surplus that is taxable by the State of Michigan for purposes of the annual franchise tax?"[1]

[The word "taxable", as used in this statement, refers to that portion of the total paid-up capital and surplus of appellant that would be attributable to Michigan for the purpose of determining the amount of appellant's total paid-up capital and surplus for franchise fee computation purposes. The privilege fee in question is measured by the application of a 4-mill rate to the allocated or apportioned part of total paid-up capital and surplus attributable to Michigan by use of an apportionment formula.]

In addition, appellees, by their Motion to Dismiss, raise the following issues: (1) the question presented is so unsubstantial as to not warrant further argument, (2) the appellant has not properly raised any federal question, and (3) the judgment of the Supreme Court of Michigan is conclusive.

---

[1]

This statement of the question is taken from the "Statement of Questions Involved", as it appears on p (i) of appellant's brief in the Supreme Court of Michigan, and quoted by the Supreme Court of Michigan in its opinion [163-a); 353 Mich 636 at p 660].

STATEMENT OF THE CASE

Appellees agree to the accuracy of the facts in the appellant's statement of the case (5-9), except they do not agree with the statement on p 5 concerning when apportionment or allocation formulae are to be employed. No reference is made in the statute [Act No. 85, Public Acts of 1921, as amended (CL '48 §§ 450.301 et seq., 1954 Sup.; M.S.A §§ 21.201 et seq., Cum. Sup.)], to "interstate commerce". Section 5 of the statute, [CL '48 § 450.305, 1954 Sup.; M.S.A. § 21.208 Cum. Sup.] as quoted on pp 87a-88a of the Jurisdictional Statement, indicates that the entire paid-up capital and surplus of any corporation is included in the measure of the annual corporation privilege fee, if the corporation does not maintain a regular place of business outside the State of Michigan, other than a statutory office. If it does, then a formula is used.

In addition to the facts referred to by appellant, it is believed that the following facts and conclusions reached by the Supreme Court of Michigan are relevant. We quote from that opinion [(60a-61a); 353 Mich 636, pp 657-658]:

> "(1) The appellant is a railroad corporation which has most of its trackage and other physical facilities located in Michigan and hence makes year-round use of the services and protection of this State;
>
> "(2) The appellant's business is principally interstate commerce, but it also engages in substantial intrastate commerce in Michigan;
>
> "(3) As to the commerce-clause argument advanced by appellant, no claim is advanced that the $38,969

tax is unreasonable and this record amply supports a contrary finding of fact of the Michigan corporation tax appeal board;

"(4) The tax is levied upon all business organized for profit and doing business within the State of Michigan and is plainly nondiscriminatory as to this taxpayer;

"(5) The tax is *not* levied upon any part of the interstate commerce of the appellant or any direct product thereof, but upon appellant's privilege of doing business within Michigan."

Appellees believe that the following construction of the privilege fee statute in question, by the Michigan Supreme Court, is material. We quote from p 67a of the Jurisdictional Statement:

"We construe the formula in section 5b as having as its purpose the ascertaining of a fair proportion of appellant's paid-up capital and surplus allocable to Michigan for purpose of taxing appellant's right to carry on its intra state business." [353 Mich 636, p 663]

The following factual references and determination of the Corporation Tax Appeal Board are also deemed relevant:

"• • • The members of the Appeal Board believe that to reduce the ratio in Michigan of appellant's net ton miles of revenue freight from approximately 78-½% to 9% (appellant's contention) completely distorts the freight business of appellant in Mich-

igan. Appellee's Exhibit 8 shows on Schedule 28 the following information:

	System	Michigan
Tons-Revenue freight	3,822,179	3,796,930
Freight locomotive miles	1,117,461	939,325
Freight revenue	$7,480,245	$6,327,474
Tons of freight on Line-Originated	1,926,388	1,902,194
Tons of freight on Line-Terminated	704,394	675,696

"We conclude that the factor of a net ton miles or (of) revenue freight as used by the appellee Commission does not unreasonably burden interstate commerce nor unlawfully deprive appellant of its property without due process of law." (40a-41a)[2]

Tons-Revenue freight	99.33%
Freight locomotive miles	84.06%
Freight Revenue	84.59%
Tons of freight on Line-Originated	98.74%
Tons of freight on Line-Terminated	95.93%

The above factors combined show that 92.53 per cent of appellant's activity, as measured by such factors, took place within Michigan.

On the basis of these facts appellant seeks to invoke the jurisdiction of this Court to review the decision of the Supreme Court of Michigan [reported in 353 Mich 636], to the extent that it held valid, against the interstate-commerce objections of appellant, an apportionment formula employed in the Michigan franchise fee statute to arrive at that portion of the total paid-up capital and surplus of appellant which would be attributable to Michigan for Michigan franchise privilege fee purposes.

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[2]

From the above table it is to be found that the following percentages of business were done in Michigan:

The applicable formula (4, 88a) employs the equally-weighted factors of net ton miles of freight and miles of track. Thus, since 78.61% of appellant's total net miles of freight everywhere and 81.18% of its miles of track everywhere were within Michigan, the formula apportioned 79.89% [81.18% + 78.61% ÷ 2 = 79.89%] of appellant's total paid-up capital and surplus to Michigan for franchise fee measurement purposes. Therefore, the only question sought to be raised by appellant is the proper *measure* of a franchise fee imposed on appellant for the privilege of doing an *intrastate business* in Michigan as a foreign corporation.

Appellant urges that proper apportionment should be 45.09% of its total paid-up capital and surplus for this purpose, instead of the 79.89% (7). It urges that this is necessary (1) because the tax, as measured by the § 5b formula, is imposed on the privilege of engaging in interstate commerce, and (2) because of the relationship of the factor "net ton miles" to interstate commerce (11-15). It concedes that the use of other apportionment factors, such as total tangible property, could have been properly used, even though the use of such factors would give the same result (15).

In contrast to these contentions of the appellant, the Supreme Court of Michigan concluded, as follows:

> "We find no United States supreme court precedent which interprets the commerce clause as forbidding use of such an allocation formula (the § 5b formula) unless the result is shown to be unreasonable or discriminatory." [(69a); 353 Mich 636, p 665]

REASONS FOR GRANTING THE MOTION TO DISMISS

1. A substantial federal question is not presented.

The appellant urges that there is a substantial federal question involved because the annual corporate privilege fee in question is a tax imposed on the privilege of engaging in interstate commerce (11), and invalidly uses in its measure "certain elements of the interstate process" (15). It then concludes that cases forbidding the imposition of a tax on the privilege of doing interstate commerce[3] are applicable, as are the cases that prohibit a state from taxing gross receipts derived from such commerce.[4]

Contrary to appellant's argument, it has been clearly established by many decisions of the Supreme Court of Michigan (which are amply supported by the specific statutory language) that the annual franchise fee in question is one imposed upon foreign corporations for the privilege of being qualified to do business within the State of Michigan. Section 4 of the statute[5] specifically provides:

> "Every • • • profit corporation organized or doing business under the laws of this state, or having the privilege to do business, employing capital or persons, owning or managing property or maintain-

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[3]

Appellant cites Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 US 157; Railway Express Agency, Inc. v. Virginia, 347 US 359; and Spector Motor Service, Inc. v. O'Connor, 340 US 602.

[4]

Appellant cites Cooney v. Mt. States Tel. & Tele. Co., 294 US 384.

[5]

CL '48, § 450.304, 1954 Sup.; M.S.A. § 21.205 Cum. Sup.

ing an office, or engaging in any transaction, in this state, (with noted exceptions) * * * shall pay, at the time of filing the annual report with the Michigan corporation and securities commission, * * * an annual fee of 4 mills upon each dollar of its paid-up capital and surplus, * * *. It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, having the privilege of exercising corporate franchises within this state * * *." (85a-86a)[6]

The Supreme Court of Michigan, in the opinion below, characterized the tax in question as follows:

"The tax complained of has been interpreted by this Court as a franchise tax imposed upon the right to do intrastate business — with that privilege measured by the amount of paid-up capital and surplus reasonably allocable to Michigan.

* * *

"Mr. Justice Smith, in a recent decision of this Court interpreting the same tax (albeit a different allocation formula), held:

"'We are taxing the privilege of carrying on intrastate activities. * * * We are taxing the value of the exercise of a privilege in this State and we ascertain that value through the application of prop-

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[6]

Cf § 5e (CL '48 § 450.305e, 1954 Sup.; M.S.A. § 21.208(5) Cum. Sup.) which provides for adjustment of the statutory formulae if "an allocation factor does not properly reflect the activity, business, receipts and capital of a taxpayer reasonably attributable to the state," cited by the Court below in 353 Mich 636, at pp 659-660 in connection with its construction of the statute.

erty, payroll, and sales factors to the fair average stock value or the paid-up capital and surplus.' *Cleveland-Cliffs Iron Co.* v. *Corporation & Securities Commission*, 351 Mich 652, 682." [(61a-62a); 353 Mich 636, pp 658-659]

To the same effect, see also

In re Detroit & Windsor Ferry Co., 232 Mich 574;

In re Truscon Steel Company, 246 Mich 174;

In re Detroit Properties Corporation, 254 Mich 523;

In re Detroit International Bridge Co., 257 Mich 52, Aff'd by

Detroit International Bridge Co. v. *Corporation Tax Appeal Board of Michigan*, 287 US 295;

Udylite Corporation v. *Corporation & Securities Commission*, 319 Mich 1; and

Chicago, Duluth & Georgian Bay Transit Company v. *Corporation & Securities Commission*, 319 Mich 14.

It is, therefore, apparent that the Michigan statute in question cannot be considered as one imposed upon interstate commerce or business.

The "substantial" question that appellant seeks to raise relates solely to the *measure* of a local intrastate corporate privilege fee. Appellant urges that the fee in question is invalidly determined because the § 5b apportionment formula takes into consideration, in its measurement, integral elements of its interstate business. More specifically, it urges that the net-ton-miles factor must be adjusted by excluding all interstate ton-miles from the

Michigan portion of the factor. It does not contend that an unreasonable result flows from leaving such tonnages in the Michigan portion of the factor.

Appellant's argument is novel and unsupported by any decision of this Court. It is expressly contrary to a long and well-established line of decisions of this Court upholding apportionment formulae used to measure a state's privilege fees or taxes which include in the measure the interstate aspects of a multi-state business.

As stated in

> *Home Insurance Company* v. *New York* 134 US 594, 600;
>
> "The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows."

Thus, historically, formulae comparable to the one in question have been upheld in measuring local privilege fees of railroads. Based upon the authority and precedent of

> *State Tax on Railway Gross Receipts*, 15 Wall 284,

the Court in

> *Maine* v. *Grand Trunk Railway Company*, 142 US 217 (1891)

upheld a statute of Maine based upon that portion of the railroad's gross receipts which track mileage in Maine bore to total track mileage. This Court in such case reasoned that the State of Maine had the power to impose a tax on the privilege of the Grand Trunk Railway to exercise its corporate franchise within the state. Thus, the question for decision was "what may be justly exacted for the privilege". The Court concluded that the

> "* * * rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the State and to the corporation taxed." [142 US 217, 288]

Maine v. *Grand Trunk Railway Company, supra,* is significant because of the Court's assertion that the receipts were simply used to ascertain the value of the privilege conferred and were not subject to tax.

This Court has consistently held that state income, excise or privilege taxes may be properly measured by the total business done within the state, whether denoted interstate, intrastate, or foreign in character.

Baltic Mining Co. v. *Massachusetts,* 231 US 68;

Butler Bros. v. *McColgan,* 315 US 501;

International Shoe Co. v. *Shartel,* 279 US 429;

Ford Motor Car Co. v. *Beauchamp,* 308 US 331;

Hump Hairpin Co. v. *Emmerson,* 258 US 290;

International Harvester Co. v. *Evatt,* 329 US 416;

Matson Navigation Co. et al v. *State Board of Equalization,* 297 US 441;

Spector Motor Service, Inc. v. *O'Connor, supra*, 340 US 602;

Underwood Typewriter Co. v. *Chamberlain*, 254 US 113;

U. S. Glue Co. v. *Oak Creek*, 247 US 321;

Western Cartridge Co. v. *Emmerson*, 281 US 511; and

Western Live Stock v. *Bureau*, 303 US 250

As stated by this Court in:

Baltic Mining Co. v. *Massachusetts, supra*, 231 US 68, at p 83:

"* * * A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital are not taxed as such but are taken as a mere measure of a tax of lawful authority within the State, has been sustained. * * *"

Hump Hairpin Co. v. *Emmerson, supra*, 258 US 290, at p 294:

"* * * taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed, that the principle of the cases so holding must be regarded as a settled exception to the general rule * * *"

International Harvester Co. v. *Evatt, supra*, 329 US 416, at p 421:

"• • • Nor does the fact that a computation such as that under Ohio's law includes receipts from interstate sales affect the validity of a fair apportionment.• • •"

Spector Motor Service, Inc. v. *O'Connor, supra,* 340 US 602, at pp 609-610:

"Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate. *Interstate Pipe Line Co.* v. *Stone,* 337 US 662; *International Harvester Co.* v. *Evatt,* 329 U.S. 416; *Atlantic Lumber Co.* v. *Comm'r of Corporations and Taxation,* 298 U.S. 553. The same is true where the taxpayer's business activity is local in nature, such as the transportation of passengers between points within the same state, although including interstate travel, *Central Greyhound Lines* v. *Mealey,* 334 U.S. 653, or the publication of a newspaper, *Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250. See also *Memphis Gas Co.* v. *Stone,* 335 U.S. 80."

This being the status of the law, the appellant has raised no substantial federal question.

2. Appellant has not properly raised any federal question.

In reference to questions pertaining to the proper measure of a state's fees or taxes, this Court has also consistently taken the position that the burden was upon the taxpayer to show that any particular formula had

the effect of taxing or attributing to the taxable state extraterritorial values or events.

Hans Rees' Sons, Inc. v. *North Carolina, ex rel.*, 283 US 123;

Butler Bros. v. *McColgan, supra*, 315 US 501; and

International Harvester Co. v. *Evatt, supra*, 329 US 416.

As stated in *Butler Bros.* v. *McColgan, supra*, at p 507:

> "One who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed, * * *"

Or, as stated in *International Harvester Co.* v. *Evatt, supra*, 329 US 416, at p 423:

> "* * * Unless a palpably disproportionate result comes from an apportionment, a result which makes it patent that the tax is levied upon interstate commerce rather than upon an intrastate privilege, this Court has not been willing to nullify honest state efforts to make apportionments * * *."

Thus, it is evident that before appellant is in a position to raise a substantial federal question in regard to the validity of the apportionment formula in question, it must have urged and been able to substantiate, "by clear and cogent evidence", that the formula in question did not reasonably measure its business done within Michigan. Basically, it is a due process question.

Hans Ree's Sons, Inc. v. *North Carolina, ex rel., supra*, 283 US 123;

Compania General v. *Collector of Internal Revenue*, 279 US 306;

Equitable Life Assurance Society v. *Pennsylvania*, 238 US 143; and

Connecticut General Life Ins. Co. v. *Johnson*, 303 US 77.

Nowhere, in the proceedings below or in its Jurisdictional Statement, has appellant urged that the formula in question unreasonably attributes to Michigan a disproportionate part of its total business.

The appellant, therefore, has not properly preserved, pursued or raised in its proceedings in this cause the federal question that it claims should now be reviewed by this Court.

3. The judgment of the Supreme Court of Michigan is conclusive in the premises.

Even though the factual question in regard to the reasonableness of the measure of the fee in question had not been properly raised by the appellant, the Corporation Tax Appeal Board below (40a-41a) and the Supreme Court of Michigan below (61a) specifically found, as a matter of fact, that the formula in question, as applied to appellant, did not unreasonably measure the privileges granted by Michigan and that the appellant was entitled to no relief. As stated in the opinion of the Michigan Supreme Court quoted above:

> "(3) As to the commerce-clause argument advanced by appellant, no claim is advanced that the $38,969 tax is unreasonable and this record amply supports a contrary finding of fact of the Michigan corpora

tion tax appeal board;" [(61a); 353 Mich 636, at p 658]

In the absence of the appellant's raising any factual question to the contrary and in the absence of the appellant's offering any evidence in support of a contrary factual conclusion, the decision of the Supreme Court of Michigan is now conclusive.

CONCLUSION

It is believed that the reasons herein advanced in support of this motion have been recently considered with favor by this Court in

Railway Express Agency, Inc. v. *Virginia*, No. 38, Oct. Term, 1958, U S Sup Ct, Decided Feb. 24, 1959.

It was there held that the State of Virginia could include within the value of a local tax measure the total of all values reasonably attributable to the State, regardless of whether denoted intra- or inter-state in character. The Court further concluded that the question of the measure of the tax was not properly before the Court, because:

"• • • it is necessary that appellant make an affirmative showing that the mileage method used by Virginia is so palpably unreasonable that it violates due process. This it has failed to do. • • •"[7]

The Court then continued:

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[7]

As indicated on p 7, appellant's Michigan miles of track is 81.18% of its total, while the formula in question attributed 79.89% of appellant's total paid-up capital and surplus to Michigan.

"• • • Even where taxpayers have attempted to show through evidence, as this appellant has not, that a given apportionment formula effected an appropriation of more than that to which the State was entitled, this Court has required '"clear and cogent evidence" that it results in extraterritorial values being taxed.' • • •"[8]

These same conclusions were impliedly involved in the cases of:

Northwestern States Portland Cement Co. v. *State of Minnesota*, No. 12, Oct. Term, 1958, U S Sup Ct, Decided Feb. 24, 1959, and

T. V. Williams, as State Revenue Commissioner, v. *Stockham Valves and Fittings, Inc.*, No. 33, Oct. Term 1958, U S Sup Ct, Decided Feb. 24, 1959.

It is, therefore, respectfully submitted that the appeal should be dismissed.

Respectfully submitted,

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[8]

In support of this statement are cited: Butler Bros. v. McColgan, supra, 315 US 501, 507 (1942); Norfolk & Western R. Co. v. North Carolina, 297 US 682, 688 (1936); Bass, Ratcliff & Gretton v. State Tax Commission, 266 US 271, 282-284 (1924); and Nashville, C. & St. L. R. v. Browning, 310 US 362, 365-366 (1940).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 712

DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY, a Minnesota corporation,
Petitioner-Appellant,

vs.

MICHIGAN CORPORATION AND SECURITIES COMMISSION and
MICHIGAN CORPORATION TAX APPEAL BOARD,
Defendants-Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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The Mileage Through Which Interstate Freight is Transported in the State of Michigan is not an Element that can be Considered in Fixing the Tax Exacted by the State for its Privilege of Transacting Business Within the State

The principal reason why appellant files this short brief in opposition to the motion to dismiss of the appellees, is to discuss the decision of this Court in the case of *Railway Express Agency v. Virginia* which was decided on February 24th last after the filing of the jurisdictional statement.

As explained at page 15 of the jurisdictional statement, the point which this appellant seeks to raise is this: where a corporation is engaged in both interstate and intrastate commerce, there are certain elements of the interstate process which are such essential and integral parts thereof that they cannot be used in any way at all in fixing the fee which a state may exact from this corporation for the privilege of engaging in intrastate commerce within the boundaries of that state. And, of course, it is further contended that the transportation of freight in interstate commerce is such an inadmissible element. At page 11 of the motion to dismiss, counsel for appellees state that this argument is novel, but actually, that is not so.

The point is expressly stated in *Michigan-Wisconsin Pipe Line Company v. Calvert*, 347 U. S. 157 and in *Railway Express Agency v. Virginia*, 347 U. S. 359. These cases are cited on pages 13 and 14 of the jurisdictional statement and appropriate quotations from the opinions of this Court are there printed. In fact, this is a very old rule. Admittedly, some matters connected with interstate commerce may be used in a formula for allocating the paid-up capital and surplus of a corporation to a state

in which it does business, for the purpose of fixing its franchise tax: an instance of this is property used in the conducting of interstate commerce. But the mileage through which materials are transported in interstate commerce cannot be considered for this purpose.

This point is illustrated by the case of *State Tax on Railway Gross Receipts*, 15 Wal. 284, cited by appellees on page 11 of the motion to dismiss, and by its companion case, the case of the *State Freight Tax*, 15 Wal. 232. Neither case involved a franchise tax, or an allocation formula, but the same point or principle is involved as is involved in the present case. In the *Freight Tax* case, the State of Pennsylvania had imposed a tax on each ton of freight transported over the tracks of railroads in that state. This tax was held bad as a direct tax on interstate commerce. The Court said, at page 275:

> Beyond all question the transportation of freight or the subjects of commerce for the purpose of exchange or sale is a constituent of commerce itself."

In the *Gross Receipts Tax* case, the state of Pennsylvania had levied a tax on the gross receipts of railroads. The constitutionality of the tax was attacked insofar as it applied to receipts from interstate commerce. This tax was upheld. It was considered that it was not a tax on the interstate process itself, but instead on the money received on account thereof which presumably had been mixed with other funds of the recipient railroad. The Court said at page 292:

> "We have recently decided in another case between the parties to the present suit, that freight transported from state to state is not subject to state taxation because thus transported."

The same principle is illustrated by the Railway Express cases recently before this Court: *Railway Express Agency v. Virginia*, 347 U. S. 359 and *Railway Express Agency v. Virginia* decided February 24, 1959. The latter case was decided subsequent to the filing of the jurisdictional statement herein. In the first of these cases Virginia had levied a license tax on the business of the Express Agency. The tax was a percentage of the receipts from business originating in or ending in or passing through Virginia. It was designated as a tax on the privilege of doing business in Virginia. This Court held that the tax was repugnant to the commerce clause of the Constitution. In the second case, just decided, the tax is no longer a tax on the privilege of doing busines in Virginia, but instead is in lieu of all other taxes on intangible property and taxes on rolling stock. This tax is upheld, it is not a tax on interstate commerce, instead it is a tax in lieu of a property tax.

Here let us emphasize that the Supreme Court of Michigan has expressly and carefully held that the tax involved in the case at bar is a tax on the right of appellant to carry on its intrastate business in the State of Michigan. See page 9 of the jurisdictional statement. It is in not a property tax, or a tax in lieu of a property tax.

Now suppose that in these cases the tax had not been a percentage of the receipts from business originating or ending in Virginia or passing through it, but instead had been based on the mileage traveled in Virginia by the articles whose transportation constitutes this business. It is believed that this Court would have held such a tax unconstitutional, and that for the same reason it should hold the tax in the instant case to be unconstitutional.

It is submitted that if the tax in this case is upheld, it will mean that today this Court holds that the states can tax interstate commerce directly—provided, of course, that there is no discrimination; and that for this reason the question here involved merits a full hearing.

Respectfully submitted,

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